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Supreme Court, U.S.
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No. (2)

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN SLAGTER,
Petitioner,

v.

STONECRAFT, LLC,
Respondent,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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APPENDIX A- Opinion of the United States Court of Appeals for the Fifth Circuit, December 21, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 21, 2007
Charles R. Fulbruge III
Clerk

No. 06-60798

IN THE MATTER OF: STONECRAFT LLC,

Debtor,
JOHN SLAGTER,
Appellant,
V.

STONECRAFT, LLC,
Appellee.

Appeal from the United States District Court
from the Southern District of Mississippi, Jackson
USD0. No. 3:05-cv-560

Before DAVIS, STEWART, and OWEN,
Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH Cir.R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CR. P. 47.5.4.

No. 06-60798

In this bankruptcy appeal, only one significant issue is presented: whether the appellant John Slagter, impliedly consented to the bankruptcy court rendering final judgment in an adversary proceeding thereby treating this non-core proceeding as though it were a core proceeding. For the following reasons we answer this question in the affirmative.

1. In June 2004, after the court denied appellant's motion for abstention in which he claimed the right to de novo review of the bankruptcy court findings, appellant, without any reservation of rights, filed a counterclaim seeking an order awarding him ownership of the patent at issue.

2. In November 2004, appellant filed a motion for summary judgment seeking a final adjudication by the bankruptcy court.

3. In January 2005, trial on the adversary proceeding was held. Appellant raised no argument in pretrid briefing or at trial that the case should proceed as a non-core matter.

4. After the bankruptcy court rendered judgment awarding the patent to appellee, appellant filed no objection to the bankruptcy court findings under 28 U.S.C. § 157(c)(1) which provides for de novo district court review of a bankruptcy court's findings of fact and conclusions of law, Instead, appellant lodged his

appeal to the district court under 28 u.s.c. § 158(a), the section applicable to appeals from final judgments of the bankruptcy court.

The above action and inaction of the appellant adequately demonstrates that he consented to the jurisdiction of the bankruptcy court to decide this case as a core proceeding. *See McFarland v. Leyh (In The Matter of Texas Gen'l Petroleum Corp.)*, 52 F.3d 1330, 1337 (5th Cir. 1995).

Appellant also argues that the bankruptcy court and the district court erred in denying his motion to abstain. We need not decide this issue because we agree with the district court that this case is equitably moot in light of: (1) the fact that appellant failed to obtain a stay, (2) the plan has been substantially consummated, and (3) the requested relief would affect parties not before the court. *See Manges v. Seattle-First Nat'! Bank (In The Matter of Manges),* 29 F,3d 1034, 1039 (5th Cr. 1994).

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B-Opinion of U.S. Bankruptcy Court Southern District of Mississippi, March 10, 2005

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: CASE NO. 03-05229
STONECRAFT, LLC CHAPTER 11

STONECRAFT, LLC PLAINTIFF

VERSUS PROC. NO. 03-00173
JOHN SLAGTER

DEFENDANT

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MARCH 10 2005
CHARLENE J. KENNEDY, CLERK
BY_____DEPUTY

OPINION

On consideration before the court is the complaint filed by the plaintiff, Stonecraft, LLC, (Stonecraft), against the defendant, John Slagter (Slagter); answer and affirmative defenses having been flied by the defendant; and the court, having heard and considered same at an evidentiary trial, hereby finds as follows, to-wit:

1.

JURISDICTION

The court has jurisdiction of the subject matter of and the parties to this adversary proceeding pursuant to 28 U.S.C. §1334 and § 157, in addition to the General Order of Reference entered by the United States District Court on July 27, 1984. This is a core proceeding as defined in 28 U.S.C. § 157cb)(2)(A), (B). (E), and (0).

PRE-TRIAL ORDER SUMMARIES AND STIPULATIONS

As a part of the pretrial order, entered in this proceeding on January 14, 2005, the parties set forth a concise suznmaiy of their respective positions as follows:

1. Plaintiff: In November, 1995, Stonecraft, LLC was formed to develop, manufacture, market and sell flexible concrete composites to be used as building materials. John Slagter was designated as the Manager of the limited liability company under the Operating Agreement. Stonecraft initially sought to develop building materials made of a fiber reinforced cement composite which would be extruded using a license from Northwestern University. In late 1997, Slagter advised the members that the fiber reinforced cement product was not viable and suggested that Stonecraft develop a product which did not use fibers and had higher ratios of latex to cement than the fiber reinforced cement composite. During 1998. with the assistance of Dr. Dale DeFord, Stonecraft developed a commercially viable polymer cement

composite.

In March, 1999, patent attorneys for Stoneqraft filed a provisional application for a patent with the United States Patent and Trademark Office. At Slagter's direction, Slagter was designated as the inventor of the product and processes falling within the scope of the Patent.

During the almost three and a half year period from the formation of Stonecraft until the filing of the Provisiona! Patent Application, Stonecraft accumulated significant debt, and the members, other than Slagter, had contributed 1.5 million dollars in capital. In May, 1999, an additional million dollars in capital was invested by the members, except Slagter. However, by October, 1999, Stonecraft was still experiencing difficulties manufacturing the polymer cement composite. The members had questions concerning Slagter's ability to manage the company and were unwilling to invest additional capital. From November, 1999 until mid-March, 2000, Slagter and the members negotiated an Amended and Restated Operating Agreement pursuant to which the members, other than Slagter, would contribute an additional one million three hundred thousand dollars in capital, and the company would be run by an executive committee consisting of Milt Kuyers and Slagter, pursuant to which Slagter would retain authority over day to day operations of the company, but Kuyers had the right to participate in Stonecraft management decisions.

By the end of May, 2000, the Company was still

experiencing problems with the polymer cement composite despite representations by Slagter that these problems would be solved. Additionally, it was verified that Slagter had been using company funds and employees for his personal use, and in June, 2000, the members requested Slagter to resign as manager of the company, but continue to act in a "founder" status and continue to be paid his salary. Slagter refused this offer, and he was terminated for cause. After he was laminated, Slagter claimed that lie was the sole inventor of the product and processes falling within the scope of the Patent and refused to execute an assignment which Kuyers had been requesting Slagter to execute since March, 2000.

2. Defendant: Stonecraft, LLC, was organized for the purpose of manufacturing, marketing, and selling building materials made of a fiber reinforced Portland cement composite material. The technology that is the subject of this Adversary Proceeding is not a tibet reinforced Portland cement composite and, as such, is not a technology essential to the business of Stonecraft.

From the inception of the company until June 6, 2000, John Slagter was employed by Stonecraft to manage the business and affairs of the company in general, and was never employed specifically to invent the technology that is the subject of this Adversary Proceeding.

Management of Stonecralt is vested in the members and John Slagter's employment was subject to the control of the members. There is no

express agreement between John Slagter and Stonecrafi regarding an assignment of patent rights. There is no implied-in-fact contract between John Slagter and Stonecraft regarding an assignment of patent rights. Slagter did not have a fiduciary duty to assign his patent to Stonecraft.

This bankruptcy case was filed for the purpose of transferring the assets of Stonecraft to MK Leasing Company, which is a company owned by the members in control of Stonecraft. The members of Stonecraft have engaged in willfully unfair and oppressive conduct toward John Slagter, and have acted in bad faith.

In addition, as a part of the aforementioned pretrial order, the parties stipulated to the following facts:

1. In 1991, Slagter formed Stonecraft, Inc., a Michigan business corporation.

2. Stonecraft. Inc.'s, place of bushtess was in a warehouse located on Logan Street in Grand Rapids, Michigan.

3. In the summer of 1995, Slagter solicited investments from a group of businessmen in the Grand Rapids, Michigan area.

4. Stonecraft, LLC, was organized as a Michigan Limited Liability Company on November 1, 1995.

5. The members of the Company entered into

an Operating Agreement which became effective November 1, 1995.

6. The Operating Agreement designated Slagter as the Manager.

7. Stonecraft commenced business operations in 1996.

8. In connection with the formation of Stonecraft, LLC, Stonecraft, Inc., changed its name to Slagter, Inc., effective November 1, 1995.

9. Stonecraft, LLC, obtained a license agreement from Northwestern University permitting it to use a proprietary extrusion process that would be useful in making building materials from the fiber-reinforced Portland cement composite.

10. Effective April 23, 1996, the members executed an Operating Agreement, Subscription Agreement. Employment Agreement and related documents pursuant to which an additional $475,000.00 was invested in Stonecraft,

11. Effective August 1, 1996, the members executed an Operating Agreement, Subscription Agreement, Employment Agreement and related documents pursuant to which an additional $500,000.00 was invested in Stonecraft, LLC.

12. In late 1997, Slagter proposed to the members that Stonecraft, LLC, should begin efforts to evaluate a polymer-cement composite product.

13. In February, 1998, Stonecrafl, LLC, entered into an employment agreement with Dr. Harvey Dale DeFord, and Dr. DeFord began working at Stonecraft, LLC.

14. DeFord prepared a draft of a patent application for the polymer-cement composite which included the cher.iical formulae, data tables and graphs necessary for the patent application.

15. This information and other information was provided to patent attorneys, who filed a U.S. Provisional Patent Application which was assigned serial number 60/125,327 ("327 Application").

16. The 327 Application was filed on March 19,1999, designating Slagter as the inventor.

17. Significant development. and testing of the polymer-cement composite was performed by employees and consultants retained by Stonecrafi, LLC.

18. Sonic of the equipment and materials utilized in the development and testing of the polymer-cement composite was paid for by Stoneerafi, LLC.

19. On March 23, 1999, Stonecraft, LLC, attended its first industmy trade show where it displayed floor tiles and other building products made otthe polymer-cement composite material.

20. On May 20, 1999, an Amended and Re-stated Operating Agreement was executed pursuant to which an additional $1,000.000.00 in capital was invested.

21. Stonecraft, LLC, experienced problems with efflorescence, which further delayed introduction of the product into the commercial market.

22. In late October, 1999, Milton Kuyers, who was the Trustee of a family trust which held a membership interest in Stonecraft, LLC, contacted Bob Deiong at the Miller Canfield law firm in Grand Rapids, Michigan concerning a dispute between Stagter and the other members of Stonecraft, LLC.

23. Kuyers requested Bob DeJong to represent Slagter in connection with the dispute between Slagter and the members, and Bob DeJong obtained a waiver from Slagter and all of the members, except possibly one, concerning any potential conflicts of interest.

24. Slagter and the members engaged in negotiations from November, 1999, through March, 2000.

25. On March 6,2000, a mediation occurred at which time an agreement resolving the dispute was reached.

26. On March 17, 2000, patent attorneys filed a U.S. Non-Provisional Patent Application based upon the 327 Application.

27. The Non-Provisional Patent Application was assigned serial number 09/528,336 ("336 Application").

28. As with the 327 Application, the 336 Application was filed naming Slagter as the inventor.

29. In addition to the 336 Application, patent attorneys filed a Patent Cooperation Treaty International Application.

30. This Application was assigned number PCT/US00/07192 ("PCT Application").

31. On March 20, 2000,. Stonecraft, LLC, held a scheduled members meeting.

32. At the member's meeting, it was unanimously agreed that Stonecraft, LLC, would enter into a Second Amended and Re-Stated Operating Agreement.

33. The members established an executive committee consisting of Milt Kuyers ("Kuyers") and Slagter.

34. Another members meeting was held on June 5, 2000, at which Slagter was terminated.

35. Kuyers was appointed as the managing member by the members.

36. John Slagter is an inventor of the technology described in the patent application. (It is disputed as to whether Slagter is the sole inventor.)

37. Milton Kuyers was provided a copy of the Patent Application before he signed the most recent version of the Stonecraft, LLC, Operating Agreement in the Spring of 2000.

38. Edward I. Talen, Jr., was provided a copy of the Patent Application before the most recent version of the Stonecraft, LLC, Operating Agreement was executed in the spring of 2000.

39. Prior to March 2000, Milton Kuyers discussed allegations of mismanagetnent and misuse of company finds by John Slagter with Robert Deiong.

III

PATENT DESCRIPTIONS

The patent filings, relevant to this adversary proceeding, began with the filing of a Provisional Patent Application, USSN6O/1 25,327, on March 19,1999. (Exhibit P- 27) Thereafter a Non-

Provisional Application, USSNO9/528,336, was filed on March 17, 2000. (Exhibit P-30) It has now become United States Patent No.: US 6,569,923B 1, issued on May 27, 2003. (Exhibit P-46)

Ancillary to the aforementioned patent is a Patent Cooperation Treaty Request, PCT/1JS00107192, which was filed on March 17, 2000. (Exhibit P- 31) Other international patent applications are the following: Canadian Patent Application No. 2,367,798 (Exhibit P-40); European Patent Application No.00918106.6 (Exhibit P- 41); Japanese Patent Application No. 2000-606544 (Exhibit P- 42); and Mexican Patent Application No. PA/a/2001/009447 (Exhibit P- 43). Finally, an international application published under the Patent Cooperation Treaty (Pa), No. WO 00/56679, was issued September 28, 2000. (Exhibit P-44)

In this opinion, for purposes of simplicity, the aforementioned documents will be referred to as "patent," or when making reference to the Patent Cooperation Treaty Request and the international applications, "PCTs."

IV.
DISCUSSION OF ISSUES AND FIDUCIARY DUTY

In this proceeding, the court must determine whether the subject patent is lawfully owned by Stonecraft or Slagter. Relative to this determination are the following questions:

1. What was Slagter's legal relationship to Stonecraft? That is, was Slagter a mere employee of Stonecraft or did he occupy a

fiduciary relationship to Stonecraft?

2. Since the act of invention incitides the two basic steps of(1) conception and (2) reduction to practice, when did the invention, which is the subject matter of the patent, actually come into being?

The general rule is that an inventor owns the patent rights to an invention even though the invention was conceived and/or reduced to practice while the inventor was employed. There are three well recognized exceptions to this general rule:

1. The parties can expressly contract that any ownership rights will vest in the employer.

2. The employer will have ownership rights to the invention if the employee was specifically hired to exercise his/her inventive faculties to create the resulting invention.

3. Even if the employer does not have ownership rights in the invention, it may still have a non-exclusive, non-transferrable, royalty free license, known as a "shop right," to use the patented invention.

The general rule, however, does not apply to a situation which is found to be outside a true employee-employer relationship. For example, the following comments were extracted from the 'American Intel'ctual Property Law Association Quarterly Journal," to-wit:

Outside of the employment relationship, an

employer may be the beneficial owner of a patent for an invention made by a person who occupies a position of special trust in the employer organization, such as a director or officer. That person may be under a fiduciary duty to assign the patent to the employer.

18 AJPLA QJ. 127, 132 (1990).

It is generally accepted that a person who functions, at the time of the invention in a fiduciary capacity in a business organization, may be under an obligation, in the absence of agreements to the contrary, to assign any patents resulting from the invention to the organization. That person need not be an employee, and need not have been hired to invent. Thus, where the inventor is more than an employee and occupies a special relationship of trust and confidence to the business, courts under certain circumstances have held that it would be inequitable for the individual to retain a title which more property belongs to the company. In such instances, the fiduciary agent will be compelled to assign the patent.

Id. at 147 (emphasis supplied).

Several factors may be applied by a court to determine if a fiduciary should be required to assign a patent to his or her employer, to-wit:

1. That the fiduciary, i.e., the president, CEO, manager, etc., was the "alter-ego" of the company.

2. The patent was obtained in the company's name.

3. Products based on the invention were marketed as the company's products.

4. No license agreement was executed between the inventor/fiduciary and the company.

5. The inventor led the company to believe that the patent was a company asset.

6. The fiduciary usurped a corporate opportunity by asserting control of a patent to the detriment of the company.

See. Dowse v. Federal Rubber Co.,254 F.308 (N.D. Ill. 1918); Kennedy v. Wright. 676 F.Supp. 888 (CD. Ill. 1988); and Great Lakes Press Corn. v. Froom. 695 F.Supp. 1440 (W.D.N.Y. 1987).

See also, Grip Nut Co. v. Sharp, 150 F2d 192(7th Cir. 1945), where the court determined that the president and principal executive of the company owed a duty of fidelity to the company and held patents as a constructive trustee for the company and Edwards v.Gramling Engineering Corp., 588 A2d 793 (Md. 1991), where the court held that a shareholder, director and officer of the corporation breached his fiduciary duty to the corporation by having a patent issued in his own name without the corporation's consent, and byexerting control over the patent inconsistent with the corporation's interest

In Fletcher Cyciopedia of the Law of Private Corporations, the following comment can be found:

Where evidence sufficiently establishes that a shareholder/director of a closed corporation breached his or her fiduciary duty to the corporation by obtaining a patent in that officer's own name without the corporation's consent and by exerting control over that patent inconsistent with the corporation's interests, the Court may properly assign the patent to the corporation, enjoin the officer not to engage in any activity related to the patented object, and require the officer to turnover objects used to manufacture the patented object. This is so because an officer of a corporation has a fiduciary duty to act in good faith and in a manner reasonably believed to be in the best interest of the corporation and all of its shareholders, Thus, the president of a corporation has a fiduciary duty to assign any rights in a patent for an invention he worked on while president of the corporation.

3 Fletcher Cylopcdia of the Law of Private Corporations, §893 (footnotes omitted).

As noted hereinabove, the first issue that this court must decide is whether Slagter occupied a fiduciary relationship to Stonecraft.

As set forth in Exhibit P- 3, Slagter was designated as the Manager of Stonecraft on November 1, 1995. He was a member of the company holding a twenty percent interest and earned a salary of $5,000.00 per month. Depending on the earnings and performance of the company,

Slagter could have actually become the majority owner. Slagters general responsibilities as Manager were set forth in §7.08 of the Operating Agreement, as follows:

7.08 Manager.

The Manager shall, subject to the control of the Members, in general, supervise and control all of the business and affairs of the Company. He shall have authority, subject to such rules as may be prescribed by the Members, to appoint such agents and employees of the corporation as he shall deem necessary, to prescribe ther powers, duties and compensation, and to delegate authority to them. Such agents and employees shall hold office at the discretion of the Managing Member. He shall have authority to sign, execute and acknowledge on behalf of the Company, all deeds, mortgages, bonds, contracts, leases, reports and all other documents or instruments necessary or proper to be executed in the course of the Company's regular business, or which shall be authorized by resolution of all the Members, and except or otherwise provided by law or resolution of the Members, he may authorize any other officer or agent of the Company to sign, execute and acknowledge such documents or instruments in his place and stead. In general, he shall perform incident to the position of Manager and such other duties as may be prescribed by the Members of the Company from time to time.

Without doubt, Slagter was in charge of the day to day operations of Stonecraft. He made practically all of the decisions that affected the

company's activities. He hired employees and consultants, as well as, terminated employees without the authority of the other members. One of the individuals that he hired and fired was Dr. H. Dale DeFord, who played a significant role in the development of the subject patent.

According to his own testimony, Slagter considered himself to be synonymous with Stonecraft. The range of authority exercised by Slagter from the time that he came "on board" with Stonecraft in November, 1995, until early 2000, convinces this court that he could easily be labeled the "alter-ego" of Stonecraft.

When Slagter realized that the extrusion difficulties in producing the fiber reinforced cement composite could not be easily resolved, he effectively made the decision to turn Stonecraft's direction to the polymer cement composite beginning in late 1997. This development culminated in the filing of the Provisional Patent Application in March, 1999. A more detailed discussion of this development including the involvement. of Dr. DeFord, will be addressed hereinbelow.

It is undisputed that the polymer cement composite became the single focus of Stonecraft's manufacturing operations. While the development of this product was ongoing and even up to March, 2000, Slagter never revealed to any of the other Stoneeraft members that he intended to designate himself as the "inventor" of the composite and the related processes to the exclusion of the company.

Indeed, the court is convinced that all of the other members thought that the product belonged to the company. This is certainly understandable since Stonecraft paid for every expense related to the product's developthent and patenting. This includes, but is not limited to, the cost of the materials involved, the related labor, consultant salaries, and the fees necessary to prosecute the patent application. In the opinion of the court, the ownership of the patent was a "non-issue" until the relationship between Slagter and Stonecraft began to unravel in the Spring of 2000.

Considering the duty of loyalty of a manager to a limited liability company, the court examined a treatise entitled "Limited Liability Companies: Tax and Business Law," which offers the following comment:

> The duty of loyalty is a duty of selflessness. A manager's personal interest must yield to the interest of the organization. A manager may profit from its role in the business if the organization has giveti informed consent, or, in some circumstances, if the manager can establish that its conduct was fair to the organization. Otherwise, the manager must eschew all financial benefits. opportunities, and other advantages connected with the business.

Carter G. Bishop & Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law ¶ 10.01 [1][b] (2004) (footnotes omitted).

The treatise cites §450.4404(1) of the Michigan Limited Liability Company Act (MLLCA) which provides that a manager of a limited liability company must discharge his or her duties as a manager, "in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interest of the limited liability company." As such, the MLLCA expressly incorporates the duty of loyalty on the part of the manager to the limited liability company.

In this context, the court examined §450.4404(5), MLLCA, which provides as follows;

Except as otherwise provided in an operating agreement or by vote of the members pursuant to section 502(4) and (7), a manager shall account to the limited liability company and hold as trustee for it any profit or benefit derived by the manager from any transaction connected with the conduct or winding up of the limited liability company or from any personal use by the manager of its property. (emphasis supplied)

In order to be able to retain any-benefits from a transaction connected with the limited liability company, the manager must comply with §450.4502(5), MLLCA, which provides as follows, to-wit:

> (5) Unless authorized in advance by an operating agreement, a transaction with the limited liability company or a transaction

> connected with the conduct or winding up of the limited liability company in which a manager of the limited liability company has a direct or indirect interest or a manager's personal use of property of the limited liability company may be authorized or ratified only by a vote of the disinterested members entitled to vote. The manager shall disclose all material facts regarding the transaction and the manager's interest in the transaction or all material facts about the personal use of the limited liability company's property before the members vote On that transaction or use. (emphasis supplied

Obviously, the disinterested Stonecraft members did not affirmatively vote to allow Slagter to obtain the patent in his name to the exclusion of Stonecraft.

The court carefully considered Detroit Testing Laboratory v. Robinson, 191 NW 218, 221 Mich, 442 (1922), which was decided over seventy years prior to the enactment of the MLLCA. In this particular case an inventor, Robinson, was permitted to retain his patented invention against the claim of his fonner employer, even though he was a manager and vice-president of the employer. The court is of the opinion that not only are the factual circumstances of Detroit Testing Laboratory distinguishable from the facts pertinent to the present proceeding, the enactment of §450.4404(5), MLLCA, as a matter of law, codified that a manager of a limited liability company "shall

account to the limited liability company and hold as trustee for it any profit or benefit derived by the manager from any transaction connected with the conduct" of the limited liability company.

In Detroit Testing Laboratory, the court pointed out that the inventor had paid for the use of his employer's equipment, and, more importantly, that the invention was not essential to the conduct of the business carried on bj the employer. In the proceeding before this court, not only has Slagter paid for nothing, but the invention, the polymer cement composite, is the "heart and soul" of Stonecraft's prospective business.

The Business Plan (Exhibit P-1) was prepared by Slagter in April, 1995. It was utilized to attract the initial investors to Stonecraft and contained the following information concerning patent protection:

PATENT PROTECTION

Stonecraft, Inc. has retained the services of John Waters a patent attorney. Mr. Waters has conducted patent searches on Stonecraft's material and indicates that substantial patent protection should be available. Mr. Waters is currently in the process of applying for patents with the United States Patent Office to secure these concepts. The Center for Advanced Cement Based Materials (ACBM) at Northwestern University has applied for the use of a patent for the unique extrusion technology they have developed. ACEM has greed to enter into an agreement with Stanecraft, Inc. to

use this technology in exchange for compensation to fund further research at ACBM. It is not clear that ACBM's patented concepts are necessary to manufacthre but the technical prowess of this institution warrants a cooperative' arrangement approach to this matter.

Until such time as patent protection is obtained, the unique concepts presented in this Business Plan have been protected as trade secrets, and persons who receive information on the product are required to sign a confidential disclosure agreement.

This language is clearly an insinuation by Slagter to the prospective investors that patent protection would be available for the products that would be produced in the future by Stonecraft. While everyone acknowledges that Stonecraft's initial focus on product development was the fiber reinforced composite, early documents, also mentioned the polymer cement product. Therefore, the latter cannot be excluded from the parameter of the "Patent Protection" paragraph.

In this context, the court would also mention a memorandum to the members prepared by Slagter on February 20, 1998 (Exhibit P-10), where he stated the following:

Product

The Product and Process are in great shape!

—The latex modified cement product is testing out much better than the fiber-material.

Patenting

We are currently working with a patent attorney to consider applying for patent protection for our material. I will notify Northwestem University that we will not utilize our license with them when our attorney believes the timing is right (emphasis supplied)

Clearly, Slagter had to be referring to the patenting of the polymer cement composite because only the extrusion process for the fiber reinforced cement composite required licensing from Northwestern University. The language in this memorandum would certainly not be indicative to the members that Slagter had the intention of retaining a patent as his own.

Milt Kuyers, one of the Stonecraft members, testified that he thought that the language "our material" referred to the latex modified cement product which did not require fiber.

Typifying the message that Slagter was conveying to the members, he again mentions "our Product Development Project" in a subsequent memorandum to the members on August 7, 1998. (Exhibit P-16)

The overwhelming weight of the testimony convinces this court that Slagter occupied a fiduciary relationship to Stonecraft and, as such, owed fiduciary duties to Stonecraft. Many of the six factors, extracted from the cases cited hereinabove, are present when one examines the relationship

that existed between Slagter and Stonecraft, These factors obviously include the duty not to mislead the other company members, as well as, the dray not to usurp Stonecraft's corporate opportunity by asserting control of a patent, largely developed by Stonecraft, to the detriment of Stonecraft. While these reasons could, standing alone, mandate a decision by this court that the patent be assigned by Slagter to Stonecraft, there is much more to support this conclusion.

DISCUSSION OF CONCEPTION AND REDUCTION TO PRACTICE

Another issue to be determined is when the invention actually came into being, recognizing that the act of invention includes the two basic steps of (1) conception and (2)reduction to practice.

Slagter contends that the invention had met both of the steps prior to the tine that he came to Stonecraft. As such, he argues that the fiduciary relationship issue is meaningless. For the reasons discussed below, the court disagrees with Slagter's position.

Without doubt, Slagter conceptualized the idea of a high latex cement composite. He even created samples while experimenting in his father's garage. (Parenthetically, his father's construction company had utilized Latex as an ingredient in cement composites for bridge construction projects, although in much lower proportions.)

In his post-trial brief; Slagterstates that in

order to "reduce to practice" there must be a showing that the invention has utility. He cites Wiener v. Weiner, 666 F2d 582, 588, 212 USPQ 721, 726-727, (C.C.P.A. 1981); Gross v. General Motors Corp., 521 F.2d 45, 49, 186 USPQ 433, 434-435 (1st Cir. 1975), and Randolph v Shoberg, 590 F.2d 923, 926, 200 USPQ 647, 649-650 (C.C.P.A. 1979). The court could not agree more with this proposition. However, the court would add, that from the trial testimony, it was glaringly apparent that what Slagter had produced before coming to Stonecraft had no utility at all. There was no evidence introduced at trial indicating that Slagter's garage produced samples were even similar to the composite described in the patent application submitted on March 19, 1999.

When Slagter joined Stonecraft in 1995, his idea, even though he had produced tangible samples, was only an idea. The initial concept, presented to the Stonecraft investors, was to develop a fiber reinforced cement product utilizing the extrusion licensing authority from the Advanced Cement Based Materials Center at Northwestern University. Slagter needed the investors to commence production activities. He did not have the resources to begin on his own. Had he thought the polymer cement composite concept was a better, more viable approach, he would have attempted to "push' its development from the outset rather than the fiber reinforced product. This convinces this court that Slagter, as he stated in his own words, had only "played around" with latex as a high content component for a cement product before he joined Stonecraft in 1995.

(Slagter deposition, August 20,2001, page 38, and Slagter 2004 deposition, page 32.)

There was certainly much more to be done before Slagter's germ of an idea could be "reduced to practice" as a legitimate invention.

A significant case, offering insightful comments on the concept of "reduction to practice" is Estee Lauder. Inc. v. L'Oreal, S.A., 129 F.3d 588 (Fed. Cir. 1997), where the court stated the following, to-wit:

To prove actual reduction to practice, an inventor must establish that he "actually prepared the composition and knew it would work." Hahn v. Wong, 892 F.2d 1028, 1032, 13 USPQ2d 1313, 1317 (Fed. Cir. 1989 (quoting Mikus v. Wachtel, 542 F.2d 1157, 1159. 191 USPO 571. 573 (COPA 19761) see also Burrpuahs Wellcome Co. V. Barr Lab., Inc., 40 F.3d 1223,1228, 32 USPO2d 1915,1919 (Fed. Cir. 1994)(reduction to practice requires "the *discovery* that an invention actually works" (emphasis added)); see also Standard Oil Co. (Indiana) v. Montedison, S.p.A.. 494 F. Supp. 370, 206 USPO 676 D.Del. 1980), aff'd. 664 F.2d 356, 212 USPO 327 (3d Cir. 1981) (reduction to practice requires a showing of three elements: (i) production of a composition of matter satisfying the limitations of the count, (ii) recognition of the composition of matter, and (iii) recognition of a specific practical utility for the composition.)

Id. at p.592.

"It is well-settled that conception and

reduction to practice cannot be established nunc pro tune. There must be contemporaneous recognition and appreciation of the invention represented by the counts." Breen v. Henshaw. 472 F.2d 1398. 1401. 176 USPO 519,521 (CCPA 1973) (emphasis, added)(holding no reduction to practice during lab experiments because there was no "indication in the contemporaneous record" that utility "was recognized *at that tine*" (emphasis added)).

Id. at p. 593, 594.

As the court noted earlier. Slagter's early samples had no discernible utility.

In a chemical composite, the ratios of the ingredients utilized and the unique characteristics of the specific ingredients, actually included in the mix, are critically important. This is consistent with the deposition testimony of Louis A. Kuhlmann and Kenneth Meath, as well as, the "in court" testimony of patent attorney Benita Rohni, alt offered by Slagter.

As mentioned hereinabove, once Slagter realized that the fiber reinforced cement composite could not be effectively produced, he shifted Stonecraft's focus to the polymer cement composite. This occurred during the latter part of 1997, when Kenneth Meath, who had been employed by Slagter as a consultant, was working at Stonecraft. The status of the polymer cement composite was generically described by Meath in his notes of December 5,1996 (Exhibit D-44), to-wit: "mix is high cement/high latex with fine aggregate.

Formulation contains methocel so that (it) can be extruded..." The court surmises that "methocel" is the same
ingredient as methyl cellulose or something similar thereto. Coincidentally, this is the ingredient that Dr, Dale DeFord subsequently eliminated from the composite because it retarded the curing process. Apparently, there was no appreciable development of the product from the date of Meath's note until Dr. DeFord began his experiments.

Dr. DeFord was hired by Slagter on February 3, 1998, as product manager, responsible for product development and quality. Slagter had met DeFord when DeFord was employed at the Center for Advanced Cement Based Materials at Northwestern University. An employment agreement, dated March 3, 1998 (Exhibit P- 13), was executed by Slagter on behalf of Stonecraft, as was a Confidentiality Agreement, dated February 3. 1998. (Exhibit P- 9)

DeFord testified that when he came to Stonecraft, the emphasis had been on the development of the fiber reinforced cement product. Slagter told DeFord that he wanted to take a new approach to product development that would not necessitate the use of the Northwestern University license. DeFeat indicated that there was practically no record keeping prior to his arrival, and that Stonecraft had no ability to commercially manufacture a product of any description.

DeFord mentioned that methyl cellulose, a plasticizer, was being utilized at Stonecraft, apparently to promote extrusion, However, this

ingredient retarded the cement hydration and slowed the curing process which was being undertaken through the use of an autoclave. He indicated that there were two significant problems in curing the product with an autoclave: (1) efflorescenee, a coloration concern, and (2) "pop-ups," bubbles that appeared on the surface that resulted in exterior cracks ranging from one-half inch to one inch in diameter.

From his experiments, DeFord developed the composite that actually became the subject matter of the patent application through the following innovations:

1. Through trial and error, he adjusted the calcia/silica ratios which eliminated the need for autoclave curing and enabled the cement to "set" more quickly.

2. He eliminated methyl cellulose as an ingredient since this retarded the curing process. (As noted above, the court is of the opinion that this ingredient was included in Slagter's early samples.)

3. He included a precipitated silica which enhanced the shaping of the product. (The inclusion of reactive silica is an important part of the composite mix. It is primarily a combination of precipitated silica and ground silica. Although precipitated silica was being used at Stonecraft when DeFord arrived, significantly. Slagter had never utilized or experimented with precipitated silica

before he came to Stonecraft. DeFord developed the appropriate ratio of precipitated silica to ground silica that would allow the composite tote produced economically and functionally It was described in the patent as striking a balance between reactivity, cost and rheology.)

DeFord was the only person at Stonecraft working on adjusting the calcia/silica ratios. He developed the spreadsheet (Exhibit P- 11) and the computer program that was used to calculate the ratios.

Corroborating that DeFord's experiments modified and refined Slagter's basic idea, Stonecraft introduced several "batch sheets" which memorialized the experiments' data. The following are examples:

Batch Sheet No. 1, dated March 18, 1998 (Exhibit P- 12)- The data do not meet any of the claims reflected on the patent application; this was an early experiment prepared just after DeFord arrived at Stonecraft, This sheet is demonstrative that there had been little effective experimentation with or development of this material since Slagter's arrival in1995.

Batch Sheet No. 18, dated March 23, 1998 (Exhibit P- 15)- This experiment was getting in the range of patent claims No. 1, No. 32, and No. 33, but not No. 29. DeFord testified - that Slagter had not experimented in these

ranges earlier.

Batch Sheet No. 108, dated August 20. 1998 (Exhibit P-17) - This was the first batch that was not cured by autoclaving: methyl cellulose had been eliminated; and the batch had been cured in eight days. It satisfied claim No.23 of the patent application.

Batch Sheet No. 121, dated September 14, 1998 (Exhibit P- 18)- This batch was cured in six days and did not require autoclaving; it met all oft he claims set forth in the patent application.

A draft patent application, executed on February 17, 1999 (Exhibit P- 23), was prepared exclusively by DeFord. DeFord delivered the patent application to Slagter who then submitted it to patent attorney, Benita Rohm. In her effort to complete the application, Rohm posed numerous questions to DeFord for assistance. (Exhibit P- 24) DeFord answered each of the questions and "fleshed out" his earlier diagrams with text explanations. (Exhibits P-25 and P-26) All of this information was returned to Rohm. Ironically, the bulk of the Provisional Patent Application, prepared and filed by Rohm on March 19, 1999, was identical to DeFord's draft application. (Compare Exhibit P- 23 to Exhibit P- 27)

DeFord was solely responsible for the experiments reflected on Exhibit P-IS and P-IS which met the claims set forth in the Provisional Patent Application. DeFord was told by Slagter to

designate Slagter as the inventor on the draft application. DeFord did as he was told but now has challenged this designation with the U.S. Patent and Trademark Office.

The patent application was initially not accepted by the U.S. Patent and Trademark Office. This necessitated the preparation of a Response to Office Action which was undertaken by Rohm for submission on September 27, 2002. (Exhibit P- 45) The information utilized in this response was compiled primarily from the data generated from DeFord's experiments. This court perceives that were it not for DeFord's work and his detailed records, the patent may never have been issued.

At trial, there was no testimony that Slagter was involved in DeFord's experiments, other than perhaps reporting the results to the other Stonecraft members. Coincidentally, on October 7, 1998, Slagter, as Managing Member, sent a memorandum to the other members (Exhibit P-19), which set forth the following:

Product and Process

> We have completed work on the mix for the product and we do have a material that dots not need to be autoclaved. We have been curing under a blanket at 110 degrees Fahrenheit for seven days. This is followed by a dry cure which pulls the water out of the product and allows the latex to develop its properties. The mix we use does not need a special rapid setting cement. We were able

> to get regular cement to set by adjusting the calcium to silica ratio. This is the direct result of Dale's discoveries while we had him working at the University of Illinois. (emphasis supplied)

The acknowledgment of 'Dale's discoveries" in the aforementioned memorandum is a glaring, yet apparently candid, admission by Slagter that DeFord's work had contributed substantially to the development of the polymer cement composite. (Parenthetically, the court would observe that this memorandum was disseminated at a time when the relationship between Slagter and the other members was still at a high level.)

In the opinion of the court, DeFord configured the ingredient ratios and processes expressed in the patent application. This is conclusively evidenced by the batch sheet documentation. The refinement of the ratios with the addition and exclusion of specific ingredients is obvious. The data on hatch sheet No. 1 is significantly different from the data on batch sheet No. 121, where all claims set forth in the patent application were met.

While DeFord's work did not provide a panacea to cure all of the mass production issues, it substantially modified Slagter's earlier efforts. To say that DeFord's experiments did not "reduce the invention to practice" is simply disingenuous.

This court is not called upon to determine whether DeFord should be labeled as a co-inventor

on the subject patent. and, therefore, makes no decision in this regard, However, while the idea for this invention was "conceived" by Slagter, it was clearly "reduced to practice" by Stonecraft through the work of DeFord and 100% at the expense of Stonecraft.

The court would be remiss by not mentioning that Slagter was compensated initially for bringing his "intellectual property" to Stonecraft. In the Subscription Agreement and Investor Questionnaire, dated November 1, 1995 (Exhibit P-3), there is the indication that the intellectual property was purchased for the sum of $85,000.00. In the Revised Subscription Agreement and Investor Questionnaire, dated August 1, 1996 (Exhibit P- 6), the amount was raised to $177,000.00, The increase was necessary to pay-off Slagter's earlier debts. As such, Slagter appears to have been compensated for his "idea."

VI

DISCUSSION OF SECOND AMENDED AND RESTATED OPERATING AGREEMENT

Following a mediation that occurred in March, 2000, a Second Amended and Restated Operating Agreement, dated April 6, 2000 (Exhibit P-33), was executed by Slagter and Stonecraft which contains the following paragraph:

12.07 Merger and Modification. This Agreement and the Related Agreements constitute the entire agreement between the parties with respect to the

subject matter hereof, and any prior discussions, negotiations and agreements between the parties are merged herein. Except as provided in Article XI, no amendment or modification of this Agreement shall be enforceable except if inwriting and signed by the party against whom enforcement is sought.

Slagter contends that since it was known at the time this agreement was executed that he was designated as the inventor on the patent. that the "merger language" controls the issue of the patent ownership since it was not otherwise specifically addressed in the agreement. As such, Slagter argues that contractually Stonecraft and the members have acquiesced that he is indeed the patent owner. To the contrary, the members assert that the issue of patent ownership was never addressed. They contend that from the outset, it was always understood that any products developed by Stonecraft would be owned by Stonecraft and protected by patents that Slagter would obtain.

The mind set of the members is completely understandable considering the many representations made by Slagter and particularly in view of a position taken by Slagter in a lawsuit that he initiated against DeFord on behalf of Stonecraft shortly after he terminated DeFord. This cause of action was filed in the Chancery Court of Warren County, Mississippi, and sought to enjoin DeFord from disclosing any proprietary information that he might have learned at Stonecraft. In the complaint, Slagter alleged, inter

alia, that Stonecraft was in the business of inventing and developing polymer modified cement composite material. (Exhibit P-47) (emphasis supplied)

Kuyers testified that the first actual notice that he received asserting that Slagter claimed individual ownership of the patent to the exclusion of Stonecraft was the letter drafted by attorney Delbert Hoseman, dated September 21, 2000. (Exhibit P-39) Kuyers added that, since everyone thought that Stonecraft already owned the intellectual property, there was no need to cover this subject in the Second Amended and Restated Operating Agreement.

Slagter acknowledged at trial that the issue of patent ownership and/or its assignment to Stonecraft was not discussed during the aforesaid March, 2000., mediation. It likewise does not appear to be contemplated anywhere in the Second Amended and Restated Operating Agreement.

Consequently, since there was no meeting of the minds relative to the ownership issue, it cannot be resolved or governed by the "merger and modification" clause set forth in the agreement.

The court also cannot ignore §450.4407, MLLCA, which provides that the articles of organization and/or an operating agreement cannot eliminate or limit the liability of a manager or (a) The receipt of a financial benefit to which the manager is not entitled.

Because Slagter owed fiduciary duties to Stonecraft and because he did not reduce the invention to practice, he is not entitled to retain the benefit of the patent.

VII.

DISCUSSION OF AFFIRMATIVE DEFENSE

Slagter asserts as an affirmative defense that he was wrongfully terminated by the other members of Stonccraft. While he was clearly relieved of his managerial duties and terminated as the Managing Member, he was not completely driven away from Stonecraft. According to the testimony, he could have continued to draw his salary, he was offered the title of "founder," and he could and does retain his member interest. The question that must be answered is why did all of this happen "on the heels" of the execution of the aforementioned Second Amended and Restated Operating Agreement.

There were rumors as early as February, 2000, that Slagter had misused company funds to purchase personal assets, as well as, to pay for non-company related travel. While this appears to be unauthorized and perhaps even improper, the amounts involved do not seem exorbitant and could have been reimbursed without significant difficulty. The court does not believe that these events, standing alone, precipitated the decision to terminate Slaver as the company manager. These occurrences were just pieces of a much larger picture.

In addition to the foregoing, Slagter acknowledged that he used Stonecraft employees to perform work on a home that he purchased in Vicksburg, Mississippi However, he offered an explanation for this activity; that is, the residence would be utilized to provide housing for the employees of an outside construction firm who were performing work for Stonecraft. Stonecraft would otherwise have had to provide lodging accommodations at its expense for these outside employees. The use of Slagter's residence for housing was to be offset as a rental charge against the expenses incurred by the Stonecraft employees who performed work on the residence. While there appears to have been a very loose agreement about this particular issue, the testimony was somewhat confusing. Regardless, the court does not perceive this issue to be the overriding cause of Slager's being relieved of his managerial duties.

Slagter's relationship with Stonecraft in early 2000 had been ongoing for over four years. No products were being manufactured in a commercial manner. Slagter's ability to "deliver" as the Managing Member appeared to be in doubt insofar as the other members were concerned. During calendar year 1999, he began having difficulty in dealing with other managerial employees, particularly Jamison Goorman, a Certified Public Accountant who Slagter had recently hired, and John Fenske, who had been brought on board as a consultant by Mill Kuyers.

Laurie DeVries, who was hired by Slagter October, 1998. as a colorist, testified that she was

discouraged by Slagter from communicating with Stonecraft employees at the Rolling Fork, Miss ssippi, facility. She also testified that Slagter began to isolate himself from the other employees by remaining in seclusion in his office.

Slagter terminated DeFord in May, 1999, and also terminated a secretarial employee, Rhonda Boss, because she had not told Slagter that DeFord had interviewed for a job with another company. Slagter indicated that he felt that DeFord had betrayed him. As noted hereinabove, shortly thereafter, Slagter initiated the chancery court lawsuit against DeFord on behalf of Stonecraft.

Stonecraft's day to day operations were described by several witnesses as "dysfunctional" Slagter even used this terminology in his own testimony. Considering the overall flavor of the evidence presented at trial, the court believes that this is indeed an appropriate description. The relationship between Slagter and the other members appeared to "peak" in the Spring of 1999, but following the termination of Dr. DeFord, this relationship began a "downward spiral" which ended with Slagter's termination slightly more than a year later. The court cannot speculate whether this deterioration was primarily caused by a heightened distrust of Slagter or by the undercapitalization of Stonecraft which also appears to be problematic.

There was testimony to the effect that the problems at Stonecraft were not all attributable to

Slagter. Both Attorney Robert DeJong, who was employed to represent Slagter by Mitt Kuyers, and his wife, Mary Dejong, who was employed as a Stonecraft consultant by Slagter, testified that they thought Slaver was treated unfairly. Considering all of the testimony, however, this was clearly the minority viewpoint.

A cause of action, very similar to the subject adversary proceeding, was initially filed by Stonecraft against Slagter in the Circuit Court of Kent County, Michigan. In his responsive pleadings, Slagter filed a counterclaim against Stonecraft asserting, inter alia, that he had been wrongfully terminated by Kuyers and the other Stonecraft members.

Slagter also filed a counterclaim in the current adversary proceeding, which was essentially premised on the following two factors:

1. That the court would conclude that Slagter would be required to transfer or assign the subject patent to Stonecraft.

2. That, thereafter, because of the alleged "willfully unfair and oppressive" conduct of the members in control that Slagter's fiduciary duty or implied contractual duty should be negated, thus relieving him of the requirement to transfer or assign the patent to Stonecraft.

This counterclaim was dismissed for the following reasons:

First, the court looked to §450.45 15, MLLCA. which provides as follows, to-wit:

§450.4515. Actions by members against managers or members in control; order for relief.

(1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:
(a) The dissolution and liquidation of the assets and business of the limited liability company.
(b) The cancellation or attention of a provision in the articles of organization or in an operating agreement.
(c) The direction, alteration, or prohibition of an act of the limited liability company, or of members, managers, or other persons party to the action.
(d) The purchase at fair value of the member's interest in the limited liability company, either by the company or by the managers or other members responsible for the wrongful acts.
(e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3

years alter the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered die cause of action under this section, whichever occurs first.
(2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member, The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

Second, the court looked to §450.4407(a), MLLCA, which provides as follows, to-wit:

§450.4407. Managers; eliminating or limiting liability; exceptions.

A provision in the articles of organization or an operating agreement may eliminate or limit the monetary liability of a manager to the limited liability company or its members for breach of any duty established in section 404, except that the provision does not eliminate or limit the liability of a manager for any of the following:
(a) The receipt of a financial benefit to which the manager is not entitled.

The court then pointed out that while §450.451 5,MLLCA, says that the court can grant whatever relief it considers appropriate, including,

but not limited to, those remedies set forth in subparagraphs (a)through (e), the relief sought in Slagter's counterclaim conflicted with the policy provided in §450A407(a), MLLCA, as well as, specific provisions of the United States Bankruptcy Code.

Thereafter, the court explained that if it reached the conclusion that Slagter was required to transfer the patent to Stonecraft, the patent would become an asset of the bankruptcy estate. By law, it would then have to be dealt with in keeping with the distribution provisions of the Bankruptcy Code. This would be true even if Stonecraft were ordered to be dissolved and liquidated. In essence, while the counterclaim might set forth a viable cause of action for unfair and oppressive conduct, the underlying remedy, which would have been the surrender of a bankruptcy estate asset by the debtor to an otherwise unsecured creditor, whose claim was primarily focused against the individual members of the debtor, could not be maintained as a matter of law. No monetary damages were demanded from Stonecraft. The court dismissed the counterclaim from the subject adversary proceeding because the relief requested was simply inappropriate and impermissible.

The court acknowledged, however, that Slagter's claim could be maintained in the Circuit Court of Kent County, Michigan, pursuant to §450.4515, MLLCA, but the underlying remedy or request for relief would necessarily have to be amended or modified.

For the same reasons discussed hereinabove, the court is of the opinion that the affirmative defense asserted by Slagter, i.e., his alleged wrongful termination and/or the inequitable conduct on the part of the other Stonecraft members, cannot be effectively raised to negate the decision of this court that Slagter must transfer the patent to Stonecraft. As noted above, Slaver's right to pursue his cause of action against the aforesaid members may be exercised in the state court proceeding. Insofar as this adversary proceeding is concerned, however, the affirmative defense is not well taken because the ultimate remedy is not sustainable as a matter of law. The court cannot disregard the Bankruptcy Code and divest the bankruptcy estate of an asset for the benefit of a single unsecured creditor even if the individual members of the debtor perpetrated an offensive and inequitable act by wrongfully terminating Slagter.

VIII

CONCLUSION

For the reasons set forth hereinabove, the court hereby concludes as follows, to-wit:

1. Slagter occupied fiduciary relationship to Stonecraft. As such, consistent with §450.4404(5), MLLCA, he held as trustee for Stonecraft any benefit that he derived from the development of the subject composite and the related patent. Consequently, he shall be ordered to transfer the patent to Stonecraft, as well as, any interest that he might have in the Patent Cooperation Treaty

Request and the international applications (PCTs),

2. The aforesaid conclusion is also premised on a finding by this court that the invention which is addressed by the subject patent was reduced to practice by Stonecraft. through the work of Dr. Dale DeFord, fully at the expense of Stonecraft.

3. The affirmative defense asserted by Slagter, i.e., his alleged wrongful termination and/or the inequitable conduct on the pan of the other Stonecraft members, cannot be effectively raised to negate the decision of this court that Slagter must transfer the subject patent and the PCTs to Stonecraft. Slagter's right to pursue his cause of action against the aforesaid members may be exercised, without prejudice, in an appropriate state court of competent jurisdiction.

A separate order shall be entered consistent with this opinion.

This the "7 day of March, 2005.

s/David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C- Judgment of the U.S. Bankruptcy Court Southern District of Mississippi-April 22, 2005

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: CASE NO. 03-05229

STONECRAFT, LLC CHAPTER 11

STONECRAFT, LLC PLAINTIFF

VERSUS ADV. PROC. NO. 03-00173

JOHN SLAGTER DEFENDANT

JUDGMENT

The above captioned adversary proceeding was heard by this court from January 18 - 21, 2005. Consistent with the court's opinion and order entered March 10, 2005, and pursuant to Rule 54, Federal Rules of Civil Procedure, it is ordered and adjudged as follows, to-wit:

The defendant, John Slagter, occupied a fiduciary relationship to the plaintiff, Stonecraft, LLC. As such, consistent with §450.4404(5), MLLCA, Slagter held as trustee for Stonecraft any benefit that he derived from the development of the subject composite and the related patent, i.e., U.S. Patent No.: 056,569,923B1. Consequently, he is

hereby ordered to transfer the patent to Stonecraft, as well as, any interest that he might hive-in the Patent Cooperation Treaty Request, PCT/US00/071 92, and all international applications (PCT's), the said intellectual property rights being more specifically identified as follows:

1. United States Patent No. 6,569,923, granted May 27, 2003, entitled "Polymer Cement Composites and Methods of Making Same."

2. Canadian Patent Application No. 2,367,798, entitled "Polymer-Cement Composites and Methods of Making Same."

3. European Patent Application No. 00918106.6, entitled "Polymer-Cement Composites and Methods of Making Same."

4. Japanese Patent Application No. 2000-060544, entitled "Polymer-Cement Composites and Methods of Making Same."

5. Mexican Patent Application No. PA/a/200l/9447, entitled "Polymer-Cement Composites and Methods of Making Same."

6. PCT Application No. PCT/US00/07192, untitled 'Polymer-Cement- Composites and Methods of Making Same."

That the transfer from the defendant to the plaintiff shall be accomplished pursuant to the Assignment form, which is approved by the court, and which is appended hereto as Exhibit A.

That the said transfer from the defendant to the plaintiff shall be completed within 10 days following the date that this Judgment becomes final and non-appealable.

II

The conclusion herein is also premised on a finding by this court that the invention, which is addressed by the subject patent, was "reduced to practice" by the plaintiff through the work of Dr. H. Dale DeFord, fully at the expense of the plaintiff.

III

The affirmative defense asserted by the defendant, Lc., his alleged wrongful termination and/or the inequitable conduct on the part of the other Stonecraft members, cannot be effectively raised to negate the decision of this court that the defendant must transfer the subject patent and the PCT's to the plaintiff. The defendant's right to pursue his cause of action against the aforesaid members may be exercised, without prejudice, In an appropriate state court of competent jurisdiction.

IV.

Count III of the Amended Complaint is now moot because of the confirmation of the plaintiff's amended plan of liquidation, As such, it is hereby

dismissed.

ORDERED and ADJUDGED this 19th dat of April, 2005.

s/David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

ASSIGNMENT

WHEREAS, on March 1, 2003 Stonecraft, LLC filled a Petition for Relief pursuant to Chapter 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Mississippi styled In Re: Stonecraft, LLC Case No. 03-05229; and

WHEREAS. Stonecraft, LLC filed an Adversary Proceeding in said Chapter 11 Proceeding against John T. Slagter styled Stonecraft, LLC vs. John T. Slagter, Adversary Proceeding No. 03-00173; and

WHEREAS. a Final Judgment was entered in said Adversary Proceeding pursuant to which, among other things. Stonecraft. LLC was declared to be the beneficial owner of the inventions, patent and patent applications listed in Schedule A annexed hereto, in the United States of America, and in its territories and dependencies and also in all countries foreign to the United Stares of

America: and

WHEREAS, the United States Bankruptcy Court for the Southern District of Mississippi, by Final Judgment entered in said Adversary Proceeding, has ordered and directed John T. Slagtcr to execute this Assignment;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN:

John T. Slagter does hereby assign and transfer unto Stonecraft. LLC the full and exclusive right, title, and interest in and to the aforesaid inventions, patent and patent applications identified in Schedule "A" hereto including any divisions, continuations, continuations-in-part. substitute, renewal and reissue applications and any Letters Patent which may be granted on said inventions and patent applications in the United States of America, and in its territories, and dependencies and also in all countries foreign to the United States of America. the same to be held and enjoyed by said Stonecrafi, LLC for its own use, and for the use of its successors, assigns, or other legal representatives.

John T. Slagter hereby authorizes the aforesaid Stonecraft. LLC and its successors, assigns, and other legal representatives to apply for a patent or patents directly in its or their own name, or in his name, upon the aforesaid inventions and wherever the same is permitted by law, and John T. Slagter also assigns. transfers and sets over unto said Stonecraft. LLC and its

successors all priority rights.

_____

John T. Slagter

_____

Date

EXHIBIT
A

APPENDIX D- Judgment of the United States Bankruptcy Court Southern District of Mississippi, October 25, 2005

UNTIED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: CASE NO. 03.05229

STONECRAFT. LLC CHAPTER 11

STONECRAFT, LLC

PLAINTIFF

VERSUS ADV. PROC. NO.03-00173

JOHN SLAGTER

DEFENDANT

JUDGMENT

Consistent with the Opinion entered contemporaneously herewith, it is hereby ordered and adjudged as follows:

(1) The judgment entered on April 22, 2005, in the above captioned adversary proceeding is amended to correct the final sentence in paragraph I. to read as follows:

"That the said transfer from the defendant to the plaintiff shall be completed within 10 days following the date that this judgment is entered."

(2) Because of the aforesaid amendment, the defendant, John T. Slagter, shall now execute the

form of the assignment appended to the judgment entered by this court on April 22, 2005, within 10 days from the date of the entry of this judgment.

(3) Should Slagter fail to do so, the Clerk of this Court, Charlene Kennedy, shall execute said assignment in Slagter's stead, and said assignment shall have the same effect as if done by Slagter, all pursuant to Rule 70, Federal Rules of Civil Procedure.

So Ordered, this the 20th day of October, 2005

s/David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E- Opinion and Order in the United States District Court for the Southern District of Mississippi Jackson Division June 1, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

JOHN SLAGTER

APPELLANT

CIVIL ACTION NO. 3:05-CV-560BN

vs. Consolidated with
NO. 3:05-MC-26JCS

STONECRAFT, LLC.

APPELLEE

OPINION AND ORDER

This cause is before the Court on the following Motions:

1. Appellee's Motion to Dismiss Appeal, filed on February 28, 2006, under docket entry no. 36.

2. Appellant's Motion to Vacate Amended Judgment and Request for Remand or De Novo Review ("Motion to Vacate") , filed on March 15, 2006, under docket entry no. 41.

Having considered the Motions, Responses, Rebuttals and all attachments to each, as well as supporting and opposing authority, the Court finds as follows;

1. The Motion to Dismiss is well taken and should be granted.

2. The Motion to Vacate is not well taken and should be denied as moot.

I. Factual Background and. Procedural History

This action is an appeal by Appellant John Slagter of a final order rendered by the United States Bankruptcy Court for the Southern District of Mississippi ("bankruptcy court") in Adversary Case No. 03-00173WDH ("Adversary Proceeding") on March 10, 2005 ("March 10 order") . Through the Adversary Proceeding, Appellee Stonecraft, LLC. ("Stonecraft") sought a determination of ownership of a patent that named Slagter as the inventor. In an Opinion entered contemporaneously with the March 10 order, the Bankruptcy Court determined that Stonecraft was the rightful owner of the patent and ordered .Slagter to transfer his rights in the patent to Stonecraft. Slagter now appeals that decision.

Stonecraft, organized in 1995 as a Michigan limited liability company, is a manager-operated LLC that was formed to develop, market and sell a flexible concrete tile using a fiber reinforced Portland cement technology.' Slagter, the promoter of the business venture, was named as manager of Stonecraft in its operating agreement. After encountering problems with the product Stonecraft originally sought to manufacturer, Slagter recommended an alternative polymer-cement composite that did not contain fiber. The members of Stonecraft authorized Slagter to test and

evaluate the alternative method. The new composite proved to be a better product than the original product. A patent was subsequently

Footnote-1 Although its administrative office was located in Michigan, Stonecraft eventually opened its manufacturing facility in Sharkey County, Mississippi in 1999.

obtained for the polymer-cement composite, and Slagter was named as the inventor ("the Patent")

In June 2000, after the Patent had been registered, Slagter was terminated as the manager of Stonecraft. Slagter thereafter refused to assign the Patent over to Stonecraft and warned Stonecraft that it had no right to manufacture or sell the product embodied in the Patent. On October 17, 2000, Stonecraft filed suit against Slagter in the County Court of Kent County, Michigan, seeking an order compelling Slagter to assign his rights in the Patent to Stonecraft ("Michigan state court action")

Before the Michigan state court action could be adjudicated, Stonecraft filed a Chapter 11 bankruptcy petition on March 17, 2003, in the bankruptcy court ("Bankruptcy Action") 2 As a result of the Bankruptcy Action, the Michigan state court action was stayed. Upon approval of the bankruptcy court, Stonecraft also obtained post-petition financing from MK Leasing, LLC. ("MKLeasing") in return for a junior lien on all encumbered assets and a priority lien on all unencumbered assets of Stonecraft..3

Wishing to liquidate substantially all of its assets, Stonecraft initiated the Adversary Proceeding against Slagter in

Footnote 2
The Bankruptcy Action, docketed as case no. 03-05229, was originally filed in the United States Bankruptcy Court for the Northern District of Mississippi, but was later transferred to the Southern District of Mississippi. MK Leasing is an LLC formed by Stonecraft members Milton Keyers and Marvin Cooper.

Footnote 3
August 2003 to determine ownership of the Patent. Stonecraft filed an amended complaint in the Adversary Proceedings in May 2004 after mediation between Stonecraft and Slagter failed. The Amended Complaint alleged that as manager, Slagter owed a fiduciary duty to Stonecraft and that Slagter breached that duty by claiming ownership of the patent. As relief, Stonecraft sought a declaratory judgment imposing a constructive trust and declaring that the Patent was property of the bankruptcy estate. Further, Stonecraft requested a turnover of all of Slagter's interest in the Patent pursuant to 11 U.S.C. § 542 and authority to sell the rights to the Patent pursuant to 11 U.S:C. § 363, 1123 and 1129. In Response, Slagter maintained that he was the rightful owner of the Patent because he had "invented" the polymer-cement composite prior to the creation of Stonecraft and therefore owed no fiduciary duty to the company with respect to the

Patent. Slagter also filed a counterclaim against Stonecraft, alleging that its members had violated the operating agreement through unfair and oppressive conduct against Slagter. The counterclaim was eventually dismissed by the bankruptcy court, without prejudice.4

After a trial in the Adversary proceeding in January 2005, the bankruptcy court, on March 10, 2005, rendered its Opinion and Order.

Footnote 4
Contending that the Adversary Proceeding was not a "core-proceeding" and in light of the Michigan state court action, Slagter also moved the bankruptcy court to abstain pursuant to the mandatory abstention requirement of 28 U.S.C. § 1334(c) (2). The bankruptcy court however denied Slagter's request for abstention.

The bankruptcy court determined that the patented product was not invented until after Stonecraft was formed, Slagter did in fact owe a fiduciary duty to Stonecraft in developing the technology, and that he held the Patent in trust for the benefit of Stonecraft. Slagter was also ordered to transfer his interest in the Patent to Stonecraft.

While the Adversary Proceeding was pending, Stonecraft filed an Amended Plan for Liquidation ("the Amended Plan") in the Bankruptcy Case which provided that all of Stonecraft's assets, including the Patent, were to be sold through auction. The Amended Plan stated however that any auction of assets should not occur

until a "final order" was entered in the Adversary Proceeding. After a confirmation hearing, the bankruptcy court, on March. 18, 2005, entered an order confirming the Amended Plan.

Before a final judgment was entered in the Adversary Proceeding, Slagter, on March 28, 2005, filed a motion to stay the March 10 Order in the Adversary Proceeding. On April 22, 2005, the bankruptcy court entered a final judgment in the Adversary Proceeding ("April 22 Final Judgment") and also granted Slagter a stay pending appeal, conditioned on the posting of a $200,000.00 bond within ten days.5

Footnote 5 As discussed infra, the April 22 Final Judgment was later amended by the bankruptcy court on January 30, 2006.

Slagter was unable to post the $200,000.00 bond within the requisite time. Consequently, on May 17, 2005, the Patent was sold at an auction sale to MK Leasing for $600,000.00. Three days later, the auction sale was approved by the bankruptcy court ("Order Confirming Auction Sale") and on May 21, 2005, Stonecraft executed a bill of sale conveying the assets sold at the sale, including the Patent, to MK Leasing. **6** MK Leasing then sold all of the assets it purchased through the sale to PolyCem, LLC ("PolyCem") 7 Slagter moved for a stay of the Order Confirming Auction Sale, but that stay was denied by the bankruptcy court. Slagter also filed two stay motions in this court, seeking a stay of both the March 10 Order in the Adversary Proceeding and

the Order Confirming Auction Sale in the Bankruptcy Action. United States Magistrate Judge James Sumner denied both motions.

Footnotes
6 Slagter has also appealed the Order Confirming Auction Sale, and that appeal is currently pending in this Court as civil action no. 3:05-CV-628BS.
Footnote
7 PolyCem was formed by members of MK Leasing.

In its April 22 Final Judgment, the bankruptcy court mistakenly stated that the transfer of the Patent should not occur until the judgment was "final and non-appealable." On December 19, 2005, this Court granted Stonecraft leave to petition the bankruptcy court to amend the April 22 Final Judgment. On January 30, 2006, the bankruptcy court did in fact enter an amended final judgment, which required Slagter to assign his rights in the Patent to Stonecraft within ten days ("Amended Final Judgment"). After Slagter failed to execute the Patent assignment, the clerk of the bankruptcy court executed an assignment on behalf of Slagter pursuant to Rule 70 of the Federal Rules of Civil Procedure. Stonecraft in turn assigned the Patent to MK Leasing. On February 15, 2006, after MK Leasing had paid the balance of the purchase price of the Patent, Stonecraft made a final distribution to its creditors in accordance with the Amended Plan.

Stonecraft now moves to dismiss the instant appeal. Slagter has also moved the Court to vacate

the Amended Final Judgment of the bankruptcy court, on the grounds that the bankruptcy court lacked jurisdiction to render a final judgment. The Court will now consider these two Motions.

II. Analysis - Stonecraft's Motion to Dismiss

In moving to dismiss this appeal, Stonecraft urges that all factors of the equitable mootness doctrine weigh in favor of dismissal. Equitable mootness is a prudential concept that is unique to bankruptcy matters. In re Manges, 29 F.3d 1034, 1039 (5th Cir. 1994) . Unlike Article III mootness, where the inquiry focuses on whether there is a live controversy, equitable mootness is appropriate where "there has been substantial consummation of [a] plan such that effective judicial relief is no longer available -even though there may still be a viable dispute between the parties on appeal." Id. ("[E]ven when the moving party is not entitled to dismissal on Article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits") (quotation marks and citation omitted) . The doctrine is designed to protect non-parties who have relied on a reorganization plan that has gained approval of the bankruptcy court and that has been substantially implemented. Id.

In In re Manges, the United States Court of Appeals for the Fifth Circuit set forth the following factors by which a court should determine whether a bankruptcy appeal is equitably moot:

(1) whether a stay has been obtained,
(2) whether the plan has been "substantially

consummated,"
and
(3) whether the relief requested would affect either the rights of the parties not before the court or the success of the plan.

Id. (citations omitted)

II.A. Whether a Stay was Obtained

The first consideration of the Court is whether Slagter was able to obtain a stay that would prevent the consummation of Stonecraft's Amended Plan. The Court notes that whether a party fails to move for a stay or whether a stay is requested but denied is irrelevant. Id. at 1040; In re Berryman Products, Inc., 159 F.3d 941, 944-45 (5th Cir. 1998) . As the Fifth Circuit has explained, "a stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." In re Manges, 29 F.3d at 1040 (citation omitted)

A stay of either the March 10 Order requiring Slagter to transfer his right in the Patent to Stonecraft or a stay of the Order Confirming Auction Sale would have prevented the implementation of the Amended Plan. Although Slagter successfully moved the bankruptcy court for a stay of the March 10 Order in the Adversary Proceeding, the stay was conditioned on a $200,000.00 bond which Slagter was unable to post. In addition, the bankruptcy court denied Slagter's request for a stay of the Order Confirming Auction Sale. Slagter was also unsuccessful in obtaining a

stay of the two Orders in this court.

Slagter argues that the bankruptcy court should not have required him to post a bond because of the "hold harmless" provision of the Stonecraft operating agreement. The Court however is not persuaded that this provision works to bar an appeal bond requirement where, as here, the company is actually pursuing a legal action against its former manager. As Stonecraft points out, it would defy logic for an LLC manager to be held harmless under the circumstances.

The Court therefore finds that Slagter's inability to obtain a stay favors dismissal.

II.B. Whether the amended Plan Has Been Substantially Consummated

The Court must next consider whether there has been substantial consummation of Stonecraft's Amended Plan. "Substantial consummation" is defined in the Bankruptcy Code as:

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;
(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
(C) commencement of distribution under the plan.

11 U.S.C. § 1101(2)..

Stonecraft contends that the following sequence of events represents a substantial

consummation of the Amended Plan:

1. The Bankruptcy Court entered Judgment in the Adversary Proceeding imposing a constructive trust upon the Patent.

2. The Bankruptcy Court granted Slagter a stay pending appeal conditioned upon the posting of a $200,000.00 bond, but Slagter failed to post the bond.

3. Stonecraft conducted the auction of all if its assets as required by the Amended Plan of Liquidation. The auction sale took place on May 17,2005.

4. The Bankruptcy Court conducted a hearing on May 18, 2005 and confirmed the auction sale.

5. In June 2005, there being no stay of either the Final Judgment or the Order Approving the Auction Sale, Stonecraft executed a Bill of Sale conveying all of its assets, including, the Patent, to the Court approved purchaser at the sale, MK Leasing.

6. MK Leasing advanced a portion of the purchase price to Stonecraft in order to pay administrative expense claims, but withheld payment of the balance of the purchase price pending Stonecraft's receipt of an Assignment of the Patent.

7. On February 13, 2006, after having

successfully defended numerous efforts by Slagter to obtain a stay pending appeal without posting a bond, Stonecraft obtained an Assignment of the Patent Rights and, on the next day, forwarded the Assignment to the United States Patent and Trademark office for recordation.

8. On February 15, 2006, MK Leasing paid the balance of the purchase price and Stonecraft made distribution to the remaining administrative expense claimants in Class I, and made payment required by the Plan to Class II, III and VIII creditors.

9. On February 17, 2006, having . received and distributed the purchase money from the auction sale, Stonecraft executed an Assignment of the Patent to MK Leasing, LLC.

Appellee's Motion to Dismiss, unmarked pp. 12-13. Slagter does not dispute that these events have occurred and does not argue that the Amended Plan has not been substantially consummated. The Court therefore finds that in light of the above described events, the Amended Plan has been substantially consummated.

II.C. Whether the Rights of Third Parties or the Success of the Amended Plan Would be Affected

Finally, the Court must consider whether a reversal of the March 10 Order would affect the rights of third parties not before the Court or would otherwise unravel the Amended Plan. Stonecraft

urges that a reversal of the March 10 Order would affect the rights of its creditors and the success of the Amended Plan. The Court agrees. The Patent has now been sold and all rights in it have been assigned to MK Leasing. Also, the proceeds from the sale of the Patent have already been used to satisfy various administrative and other priority claims of creditors who are not before this Court. If the Court were to determine that Slagter is the rightful owner of the Patent and void the assignment of the Patent, the proceeds from the Patent sale would have to be recouped from creditors and refunded to MK Leasing. There are no assurances that the creditors would be able to repay these funds. Moreover, PolyCem, relying on the unstayed Final Judgment, has altered its position by purchasing the Patent from MK Leasing and has, according to Stonecraft, invested a large amount of capital in preparing to manufacturer the polymer-cement composite.

The Court also believes the integrity of the Amended Plan would be severely undermined if the decision of the bankruptcy court in the Adversary Proceeding is overturned. A determination of ownership of the Patent was integral to the Amended Plan as the Patent appears to be the most valuable asset owned by Stonecraft. If the estate were now forced to refund the proceeds of the sale, the Amended Plan would undoubtedly fail.

Slagter does little to refute that the three factors of equitable mootness favor dismissal. Instead, Slagter argues that equitable mootness only applies to orders confirming a reorganization plan and therefore is not applicable to a final order in an adversary proceeding. Although equitable

mootness has predominately been used to dismiss appeals of confirmation orders, courts have not limited the applicability of the doctrine to such orders. See e.g., In re Grimland, Inc., 243 F.3d 228, 231 (5th Cir. 2001) (analyzing equitable mootness factors in appeal of order surcharging a creditor's collateral); In re Box Brothers Holding Co., 194 B.R. 32, 42 (D. Del. 1996) (dismissing as equitably moot appeal of order dismissing the complaint in adversary proceeding) In re Ormet Corp., No. 2:04-CV-1151; 2005 WL 2000704, *4-6 (S.D. Ohio Aug. 19, 2005) (finding appeal of order granting § 1133 relief equitably moot); In re Milk Palace Dairy, LLC., 327 B.R. 462, 467- 68 (B.A.P. 10th Cir. 2005) (equitably mooting appeal of order allowing debtor to purchase and sell property) . Faced with the same argument that Slagter has made in the instant case, the court in In re Ormet Corp. explained that equitable mootness applies to all orders that are "integral" to a debtor's plan. In re Ormet Corp., 2005 WL 2000704, at *6. Similarly, this Court is of the opinion that the March 10 Order of the bankruptcy court, which determined ownership of the Patent, was an order that was "integral" to the Amended Plan and is therefore subject to equitable mootness.

Accordingly, because all three considerations outlined in In re Manges favor dismissal, the Court concludes that this appeal should be dismissed as equitably moot.

III. Slagter's Motion to Vacate

Because the Court has determined that this appeal should be dismissed under the equitable

mootness doctrine, it need not reach the merits of Slagter's Motion to Vacate. The Court therefore denies the Motion to Vacate as moot.

IV. Conclusion

Based on the holdings presented above:

IT IS THEREFORE ORDERED that Appellee's Motion to Dismiss Appeal [docket entry no. 36] is hereby granted. This appeal of the March 10, 2005, Order of the bankruptcy court is hereby dismissed.

IT IS FURTHER ORDERED that Appellant's Motion to Vacate Amended Judgment and Request for Remand or De Novo Review [docket entry no. 41] is hereby denied as moot.

SO ORDERED this the 1st day of June, 2006.

s/ william H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

blj

APPENDIX F- Objection to Entry of Amended Judgment, Filed by Appellant, John Slagter on January 5, 2005.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

STONECRAFT, LLC — Chapter 11 Case No. 03-05229 WDH

Debtor

_____/

STONECRAFT, LLC — Adversary Case No. 03-00173 WDH

Plaintiff—Appellee

V.

JOHN SLAGTER

Defendant—Appellant

_____/

OBJECTION TO ENTRY OF AMENDED JUDGMENT

NOW COMES Defendant, John Slagter, and pursuant to 28 U.S.C. § 157(c)(1) files this, his Objection to Entry of Amended Judgment in the above styled and numbered adversary case (the "Adversary Case") as follows:

1. The Adversary Case is a non-core proceeding.

2. Pursuant to28 U.S.C. § 157(c)(1) a bankruptcy court may hear a proceeding that is not a core proceeding. however, in such proceeding, the bankruptcy judge is to submit proposed findings and conclusions of law to the district court, and, after *de novo* review, any final judgment is to he entered by the district court.

3. Contemporaneous with this objection. Slagter has filed his Response to "Combined Motion for Relief from Judgment and for Enforcement of Judgment". Slagter hereby Incorporates such response herein by reference.

WHEREFORE premises considered, John Slagter respectfully requests, pursuant to 28 U.S.C. § 157(c)(1) and Rule 9033 of the *Federal Rules of Bankruptcy Procedure,* that this Honorable Court submit its proposed findings and conclusions of law to the United States District Court for the Southern District of Mississippi.

Dated: 1-5-05

s/John Slagter
John Slagter, *in pro per*
1763 Watermark Drive SE
Grand Rapids, MI 49546
(616)915-5715

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

STONECRAFT, LLC — Chapter 11 Case No. 03-05229 WDH

Debtor

_____/

STONECRAFT, LLC — Adversary Case No. 03-00173 WDH

Plaintiff—Appellee

V.

JOHN SLAGTER

Defendant—Appellant

_____/

CERTIFICATE OF SERVICE

I John Slagter do hereby certify that on this day, 1-5-05 I caused to be mailed, postage prepaid, a true and complete copy of the foregoing "Objection to Entry of Amended Judgment" to the following:

William Little. Jr.
Lentz & Link. P.A.
P0 l3ox 22642
Jackson, MS 39225-2642

Beth' Ruth Fox
Office of the U.S. Trustee
1 00 W. Capitol Street, Suite 706
Jackson, MS 39269

Honorable David W. Houston 111
United States Bankruptcy Court

703 Highway 145, North
Aberdeen, MS 39730

s/John Slagter
John Slagter, *in pro per*
1763 Watermark Drive SE
Grand Rapids, MI 49546

APPENDIX G- John Slagter's Combined Answer and Response to Enforce Judgment Filed October 3, 2005 (P1 and P9)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

STONECRAFT, LLC
DEBTOR

_____/

STONECRAFT, LLC
Plaintiff-Appelle
V.
JOHN SLAGHTER
DEFENDANT/APPELLANT

_____/

Chapter 11 Case No.03-05229 WDH
Adversary Case No. 03-00173 WDH

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED OCTOBER 3,2005
CHARLENE J. KENNEDY, CLERK
BY_____DEPUTY

JOHN SLAGHTER'S COMBINED ANSWER AND RESPONSE TO PLAINTIFF'S MOTION TO ENFORCE JUDGEMENT

NOW COMES John Slagter and hereby files this his Combined Answer and Response to Plaintiff's Motion to Enforce Judgment in the above styled and numbered matter as follows:

ANSWER

1. The allegations contained in paragraph 1 of the Motion are legal conclusions that do not require an answer. Slagter affirmatively alleges: (a) that this matter is not a core proceeding, (b) that the property at issue is domiciled in the Western District of Michigan, and (c) that on Wednesday, September 14, 2005, this matter was docketed by the United States District Court for the Southern District of Mississippi as Case No. 3:05CV560 WHB - AGN.

2. Slagter admits the allegations contained in paragraph 2 of the Motion. Slagter affirmatively alleges that the "Stay Order" entered by this Court on April 22, 2005, was entered pursuant to Slagter's request for stay of the interlocutory judgment entered by this Court on March 10, 2005. That interlocutory judgment would have been more immediately enforceable...

An appeal from the Michigan Court's order denying Stonecraft's request for enforcement of the Judgment is only appropriate if filed in a timely manner in the United States District Court for the Western District of Michigan. Rather than proceed with such an appeal in the proper jurisdiction, Stonecraft is attempting to use this Court as a surrogate appellate court. However, Stonecraft has not establishing any valid basis for its request that this Court exercise jurisdiction over personal

property located in Western Michigan.

Stonecraft's action in bringing the present motion before this Honorable Court is blatant forum shopping. Having been denied in a court of appropriate jurisdiction, Stonecraft is now attempting to have that same matter heard again by an alternate court, outside the jurisdiction of Western Michigan.

This matter is not a core proceeding

The above styled and numbered adversary case is not a core proceeding. Stonecraft flied and prosecuted this matter in the Kent County Circuit Court in Kent County Michigan, Case No.00-1037 1-NZ for approximately four years before filing the Amended Complaint in this case. This adversary case is based exclusively on Michigan state law and the Judgment grants relief pursuant to MCL 450.4404(5) which is a specific provision of the Michigan Limited Liability Company Act. Such a claim could not have been commenced in a court of the United States absent jurisdiction under Title 11. This matter is not a core proceeding. See Matter v. Wood, 825 F.2d 90,97 (5th Cir. 1987), which states: "A suit based on state created rights that could have proceeded in state court absent the bankruptcy is not a core proceeding". [emphasis added]

APPENDIX H- Emergency Motion For Relief From Amended Judgment and Request for Immediate Hearing, Filed October 26, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

JOHN SLAGTER,
Appellant
V.
STONECRAFT, LLC,
Appellee.

Case No, 3:OScv-560 WHB-AGN
Honorable William H. Barbour

John Slagter, *pro se*
Appellant
1763 Watermark Drive SE
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SOUTHERN DISTRICT OF MISSISSIPPI
FILED OCTOBER 26, 2005
J.T. NOBLIN CLERK
BY_____DEPUTY

EMERGENCY MOTION
FOR RELIEF FROM AMENDED JUDGMENT
AND REQUEST FOR IMMEDIATE HEARING

NOW COMES, John Slagter and pursuant to Rule60(b) of the Federal Rules of Civil Procedure and Rule8011 of the Federal Rules of Bankruptcy Procedure, files this Emergency Motion for Relief from the Amended Judgment signed by the Honorable David W. Houston III on behalf of the United States Bankruptcy Court for the Southern District of Mississippi. And John Stagier hereby requests an immediate hearing of same. In support of his motion and request, John Slagter states as follows:

1. A copy of the Amended Judgment and the Opinion entered contemporaneously therewith (the "Opinion"), are attached hereto as Exhibit 1,

2. A copy of Stonecraft's Motion to Enforce Judgment is attached hereto as Exhibit 2,

3. A copy of John Slagter's Combined Answer and Response to Plaintiffs Motion to Enforce Judgment is attached hereto as Exhibit 3 and is incorporated herein by reference as additional support for the relief requested in the present motion.

JURISDICTION

4. The United States District Court for the Southern District of Mississippi has jurisdiction over this mailer pursuant to 28 U.S.C.§ 158(a)(1).

5. The Bankruptcy Court's acquisition of jurisdiction over the subject matter of and the parties to this proceeding was in

violation of 28 U.S.C.§ 1334(c)(2) in that an identical proceeding has been pending as Case No. 00-10371-NZ in the Kent County Circuit Court, Kent County Michigan since October 17, 2000. The Bankruptcy Court denied Slagter's request that it abstain and then scheduled trial of this matter during the exact same timeframe as trial would otherwise have occurred in the stare court of appropriate jurisdiction.

6. This matter is not a core proceeding.

7. The Bankruptcy Court's acquisition of jurisdiction over the subject matter of and the parties to this proceeding was improper pursuant to 28 U.S.C. § 1334(c)(1) in that the Bankruptcy Court acted as a mediator between the parties concerning the subject matter of this proceeding, prior to the commencement of this proceeding, and in such capacity engaged in extensive *ex-parte* communications with Stonecraft and other parties in interest.

8. The Bankruptcy Court's entry of an Amended Judgment on October 20, 2005 was improper in that an appeal from the Bankruptcy Court's final Judgment entered on April 22, 2005 was docketed on September 14,2005, and this matter is currently pending before the United States District Court for the Southern District of Mississippi.

CLEARLY ERRONEOUS REPRESENTATIONS

9. Slagter is representing himself in this matter and freely admits the limitations of his understanding regarding these matters. However, the Bankruptcy Court's explanation of its decision to Amend the Judgment contains statements that are so inconsistent with the record as to defy explanation, to wit:

10. On March7, 2005, the United States Bankruptcy Court for the Southern District of Mississippi (the "Bankruptcy Court") entered an interlocutory judgment and opinion in Adversary Case No. 03-00173 WDH, copies of which are attached hereto as Exhibit 4.

11. The March 7,2005 interlocutory judgment ordered that Slagter shall assign certain patent rights (the "Patent") to Stonecraft, however, such interlocutory judgment did not specify any date by which Slagter was to comply.

12. Subsequent to entry of the interlocutory judgment and prior to entry of a final Judgment, the Bankruptcy Court scheduled a sale of the Patent for May 17, 2005.

13. On March 28,2005, Slagter filed "Defendant's Motion for Stay of Order and Judgment Assigning Patent," a copy of which is attached hereto as Exhibit 5.

14. The Bankruptcy Court's representation on page 3 of the Opinion which states: *"Indeed. despite the aforesaid language, Slagter filed a motion to stay the judgment pending appeal"* is clearly erroneous.

15. The language of the final Judgment requiring that Slagter execute an assignment within 10 days after that Judgement becomes final and non-appealable did not exist on March 28, 2005 when Slagter filed his motion to stay the March 7,2005 interlocutory judgment.

16. On April 22,2005, subsequent to the April 19,2005 hearing of Slagter's motion for stay, the Bankruptcy Court entered the final Judgment which, for the first time, provided that Slagter was not required to execute an assignment of the Patent until 10 days after that Judgment becomes final and non-appealable.

17. The Bankruptcy Court's representation that the trial record of this adversary proceeding was submitted to the district court on October 18, 2005 is clearly erroneous. The record was transferred on September 14, 2005. Slagter's brief on appeal was dated October 14,2005and filed by the district court on or about October17, 2005.

18. The Bankruptcy Court's representation on page 3 of the Opinion which states: *"The use of this wording, which was not noticed for several months by the court or either party to*

this proceeding...," is clearly erroneous.

19. On May 17, 2005, less than one month after entry of the final Judgment and almost five months before the October 5,2005 "hearing on the subject motion to enforce judgment", Slagter filed: "Objection to Auction Sale" with the Bankruptcy Court, a copy of which is attached hereto asExhibit6. The objection alleged as follows:

    a. Paragraph 1 - The Auction Sale includes the sale of U.S. Patent No. US 6,569.923 entitled: *"Polymer-Cement Composites and Methods of Making Same by John Thomas Slagter"* (the "Patent") and related rights.

    b. Paragraph 2- Stonecraft does not own the Patent and related rights, there has been no assignment of such rights to Stonecraft.

    c. Paragraph 3- Pursuant to an Order entered by this Court in Adversary Case No. 03-00173 an assignment of the Patent and related rights is not required until 10 days after such Order become non-appealable.

    d. Paragraph 4- A Notice of Appeal has been filed in Adversary Case No. 03-00173 and an

appeal is pending in the United States District Court for the Southern District of Mississippi.

20. The Bankruptcy Court's representation on page 4 of the Opinion which states: *"At the hearing on the subject motion to enforce judgment filed by Stonecraft, Slagter, relying on the language in the sentence noted hereinabove, took the position that the judgment could not be enforced because it had not become 'final and non-appealable.' This was the first time that the court realized the unintended consequence that might be attributed to the aforesaid language."* is clearly erroneous.

21. In addition to the allegations asserted in paragraph 19 hereinabove, on July 5,2005, Slagter filed a "Brief in Support of John Slagter's Motion for Stay of the Bankruptcy Court's Order Confirming the Auction Sale of Stonecraft's Remaining Assets to MK Leasing", a copy of which is attached hereto as Exhibit 7. In pages 21 through 23 of such brief Slagter clearly asserted that the "final and non-appealable" language of the Judgment precludes enforcement of the Judgment and consummation of a sale of the Patent until appeals of the Judgment are complete. As evidenced by the Certificate of Service attached to the brief, the Honorable David W. Houston was provided a true and complete copy.

SLAGTER'S CHAPTER 13 BANKRUPTCY CASE

22. On April 29,2005, Slagter filed Chapter 13 bankruptcy Case No. 05-06151jdg in the United Slates Bankruptcy Court for the Western District of Michigan (the "Michigan Court"). Slagter is the sole personal guarantor of approximately $2million of Stonecraft debt and has no means of ignoring his obligations to Stonecraft's creditors if he is irreparably divested of his patent.

23. The Bankruptcy Court's representation on page 4 of the Opinion which states: *"On August 29, 2005, the Bankruptcy Court for the Western District of Michigan lifted the automatic stay so that the litigation of this adversary proceeding could continue to a conclusion."* is clearly erroneous.

24. The Bankruptcy Court for the Western District of Michigan (the Michigan Court") modified and terminated the automatic stay so that appeals of the Judgment could proceed. The Michigan Court confirmed its understanding that enforcement of the Judgment could not occur until that Judgment became final and non-appealable. (See, Exhibit 3 hereto, Hearing Transcript attached thereto as Exhibit A at pp. 7, 28). The Michigan Court relied on the language of the final Judgment when making its ruling to modify and terminate stay. The Michigan Court clearly believed that terminating stay would not prejudice Slagter's right to an appeal. Premised on such understanding, the Michigan Court

ruled that in the event Slagter is successful on appeal, title and all equitable interests in the Patent will be deemed property of his bankruptcy estate. (See, Exhibit 3, Hearing Transcript at pp.38-39)

CONTEMPT OF STIPULATED ORDER

25. On October 5,2005, in what Slagter believed to be a good faith resolution of this matter, Stoncraft and Slagter agreed to, and executed, a Stipulated Order, a copy of which is attached hereto as Exhibit 8.

26. In the Stipulated Order the parties agree that the appeal currently pending in this Honorable Court and all subsequent appeals of the Judgment Shall continue procedurally and substantively.

27. On October 7, 2005, a hearing was held before the Michigan Court, during which the Michigan Court considered, clarified, and signed the Stipulated Order.

28. Slagter immediately provided notice of the Michigan Court's order to the Bankruptcy Court via facsimile and requested that the Bankruptcy Court defer entry of an order concerning "Plaintiff's Motion to Enforce Judgment" until after it had an opportunity to review the Michigan Court's ruling and comments. Copies of correspondences among Slagter, the Bankruptcy Court, and Stonecraft's counsel are attached hereto as Exhibit 9.

29. On October20, 2005, Slagter filed a copy of the October 7, 2005 transcript and a copy of "Appellant - John T. Slagter's Brief on Appeal" with the Bankruptcy Court. A copy of such addendum is attached hereto as Exhibit l0.

30. Prior to entry of the Stipulated Order on October 7th, the Michigan Court stated that the Order serves to preserve the rights of both parties and maintain the *status quo* during the pendency of appeals of the Judgment (See, Exhibit 10, Hearing Transcript attached thereto as Exhibit A at p.8) The Michigan Court unambiguously rendered its opinion that in the event Slagter is successful in his appeal of the Judgment, the Patent will be deemed property of his bankruptcy estate. (See, Exhibit 10, Hearing Transcript at pp.4-8) The Michigan Court invited Slagter to obtain a transcript of the hearing and to provide it to the Bankruptcy Court, and if appropriate, to the United States District Court for the Southern District of Mississippi. (See, Exhibit 10, Healing Transcript at p.8)

31. On October 2l, 2005,one day after the filing of a copy of the Michigan Court transcript with the Bankruptcy Court. Slagter received, via facsimile directly from the Honorable David W. Houston III, the Amended Judgment and Opinion that are the subject of this motion.

32. Stonecraft's continued prosecution of "Plaintiffs Motion to Enforce Judgment" subsequent to October 7,2005, constitutes contempt of the Stipulated Ordered entered by the Michigan Court.

CONCLUSION

33. Stonocraft filed "Plaintiff's Motion to Enforce Judgment" pursuant to Rule 70 of the Federal Rules of Civil Procedure. Stonecraft did not request an amendment of the Judgment pursuant to Rule 52. Rule 70 is not an appropriate basis for relief because there has been no non-compliance with the final Judgment entered by the Bankruptcy Court on April 22,2005.

34. The final Judgment entered by the Bankruptcy Court on April 22,2005 is clearly erroneous in that it is contrary to applicable, dispositive law.

35. Stonecraft has repeatedly asserted that consummation of the auction sale of the Patent will render Slagter's appeal of the Judgment moot.

36. Therefore, the Amended Judgment is prejudicial to the interests of Slagter in that it will facilitate consummation of Stonecraft's auction sale of the Patent and, according to Stonecraft, serve to deny Slagter his right to appeal a clearly erroneous judgment.

37. The foregoing consequence is inconsistent with the intent and rulings of the Michigan Court and is manifestly unjust.

38. There is no "good faith, third party" purchaser to protect in this case. The Patent was purchased by MK Leasing. Stonecraft's Chapter 11 bankruptcy case was prosecuted for the express purpose of transferring the assets of Stonecraft to MK Leasing. MK Leasing is a company owned by Milton Kuyers end Marvin Cooper. Kuyer and Cooper collectively own controlling interests in Stonecraft. Kuyer was the managing member of Stonecraft from June 6, 2000 until May 6, 2005 when he resigned in an attempt to insulate himself from an appearance of impropriety when MK Leasing purchased the Patent at the auction sale held on May 17,2005.

39. John Slagter respectfully submits that the Bankruptcy Court abused its judicial discretion by amending the final Judgment after Slagter relied on the language of that Judgment while attempting to secure a bond to protect his interests, after the Michigan Court relied on the language of the Judgment when making its decision to terminate the automatic stay, after the Michigan Court entered a Stipulated Order intended to maintain the *status quo*, after an appeal of the Judgment had been docketed in the U.S. District Court, and after the Bankruptcy Court was provided a copy of

THEREFORE, PREMISES CONSIDERED, John Slagter respectfully requests that this Honorable Court enter its order to vacate, stay, or otherwise grant relief from the Amended Judgment, and grant such other relief as the Court considers appropriate.

Respectfully submitted,

Dated 10-24-05

By:s/John Slagter
John Slagter, *in pro per*

APPENDIX I- Response to Combined Motion for Relief From Judgment and For Enforcement of Judgment, Filed January 9, 2006

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OE MISSISSIPPI

STONECRAFT, LLC — Chapter 11 Case No. 03-05229 WDH

Debtor

_____/

STONECRAFT, LLC — Adversary Case No. 03-00173 WHD

Plaintiff — Appellee
V.
JOHN SLAGTER

Defendant-Appellant

FILED
JANUARY 9, 2006

_____/

RESPONSE TO COMBINED MOTION FOR RELIEF FROM JUDGMENT AND FOR ENFORCEMENT OF JUDGMENT

NOW COMES Defendant, John Slagter, and files this, his Response to Stonecraft's Combined Motion for Relief from Judgment and for Enforcement of Judgment. Slagter denies that this Court has jurisdiction over this matter. This Adversary Case is a non-core proceeding based upon a state Jaw cause of action that could not have been commenced in a court of the United States absent jurisdiction under 28 U.S.C. § 1334.

As Slagter filed a timely motion requesting that this Court abstain, this Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1334(c)(2).

The relief requested by Stonecraft is not available under Rule 60(a). Limitations on the application of Rule 60(a) were set forth by the Fifth Circuit Court of Appeals in United States v. Kellogg (In re West Texas Marketing Corp.). 12 F.3d 497 (5" Cir. 1994) in which the court stated that:

"In sum, **the relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a)** or is instead a clerical or computational mistake, which is correctable under the Rule. As long as the intentions of the parties are clearly defined and all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or planetary excursions into facts is required, Rule 60(a) will not be available to salvage the government's blunders. Let it be clearly understood that Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a ease. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a)." [emphasis added]

Pursuant to West Texas Marketing Corp the change to the judgment requested by Stonecraft is

outside the scope of Rule 60(a) because it affects rights of the parties. This principle was also clearly articulated by the Fifth Circuit Court in Britt v. Whitmire, 956 F2d 506(5th Cir. 1992): "Rule 60(a) does not apply to a motion seeking correction of an error of 'substantive judgment' **or an error that affects substantial rights of the parties.**" [emphasis added] The law is clear; any change that affects substantive or substantial rights of the parties is not available under Rule 60(a).1

The change proposed in the instant motion is intended to profoundly affect Slagter's right to due process. "Federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress" Aldinger v. Howard, 427 U.S. 1, 15 (1976). The United States Supreme Court has determined that: "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants and subject only to ordinary appellate review." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S., 568, 584,105 S.Ct. 3325, 3334-335, 87 S.F4.2d 409,722 (1985).

Footnote 1
The terms "substantive rights" and "substantial rights" are used interchangeably in opinions and other writings concerning Rule 60(a).

The above styled and numbered Adversary Proceeding is such a "traditional contract action arising under state law". As such, this Adversary Proceeding is a "non-core" proceeding. In re Wood,

825 F.2d 90 (5th Cir. 1987) states as follows:

We hold, therefore, that a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. The proceeding before us does not meet this test and, accordingly, is a non-core proceeding. The plaintiff's suit is not based on any right created by the Federal bankruptcy law. It is based on state created rights. Moreover, this suit is not a proceeding that could wise only in the context of a bankruptcy. it is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court.

This Adversary Case is a cause of action filed by Stonecraft (a Michigan Corporation) alleging that Slagter (a resident of Michigan) breached his duties under a contract (that is expressly governed by Michigan law) seeking an order to establish a constructive trust pursuant to a provision of the Michigan Limited Liability Company Act. Such a claim invokes no substantive right provided by Title 11. An identical cause of action was pending in a court of the State of Michigan for two and one half years before Stonecraft filed its bankruptcy petition and three and one half years before this Adversary Case was filed.

There can be no doubt that this Adversary Case is a proceeding that is "related to" this bankruptcy case and, as such, is not a core proceeding. In fact, the cause of action at issue in this Adversary Case was listed by Stonecraft as property of the estate on the schedules it submitted to this Court. A cause o faction filed before the

filing of a bankruptcy case is "related to" that bankruptcy case; it cannot be considered a core proceeding. The United States Supreme Court clearly established this principle in Celotex Corp. v. Edwards, 514 U.S. 300 (1995), as follows: "Proceedings 'related to' the bankruptcy, include (1) causes of action owned by the debtor which become property of the estate pursuant to II U.S.C. § 541"

This Court is already well versed in these matters.

As this honorable Court stated in AMW Cable Co. v. McCray (En re McCrav), 209 BR. 410 (Bankr. ND. Miss 1997):

Although the term "related to" is not defined in the Bankruptcy Code, the Fifth Circuit has adopted a definition first articulated by the Third Circuit. A proceeding is "related to" a Title 11 ease "if 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Wood v. Wood (In re Wood 825 F.2d 90, 93 (5th Cir. 1987) (quoting Pacor, Inc. v. Higgins, 743 F2d 984, 994 (3rd Cir. 1984). The Fifth Circuit has had recent occasion to clarify the definition of "related to" as follows:

An action is related to bankruptcy if the outcome could alter the debtors' rights, liabilities, options, or freedom of action (either positively of negatively) and... in any way impacts upon the administration of the bankruptcy estate.

Feld v. Zell Corp. (Matter of Zell Corp.), 62 F.3d 746, 752 (5th Cir. 1995) (citing In re Walker, 51 F.3d 562, 569 (quoting Pacer, inc., 743 F.2d at

994)).

If the debtor prevails in this litigation, the bankruptcy estate would be enhanced by his pro rata share of the sales proceeds realized from the sale of the Town of Metcalf cable franchise. As such, the court is compelled to conclude that this is a related or noncore proceeding.

According to this Court's own doctrine, this Court is compelled to conclude that this Adversary Case is a related or noncore proceeding.

Pursuant to 28 U.S.C. § 157(c)(l) a bankruptcy court may hear a proceeding that is not a core proceeding, however, in such proceeding, the bankruptcy judge is to submit proposed findings and conclusions of law to the district court, and, after *de novo* review, any final judgment is to be entered by the district court. 28 U.S.C. § 157 simply does not allow a bankruptcy court to take state created personal property rights away from one individual and give them to another without review by a district court.

"*De novo* review may well be the central concept in the administration of the bankruptcy court system and the federal courts. This right of a flesh evaluation of disputed matters by a district judge has constitutional significance in explaining the propriety of delegating to a lower tier of judicial officers some of the prerogatives of an Article ill judge." Collier on Bankruptcy, ¶ 3.03[3][b].

The judgment entered by this Court on April 22, 2005 took these constitutional limitations on bankruptcy court jurisdiction into account. The judgment ordered that Slagter execute a written form of assignment within 10 days alter the date

that the judgment became final and non-appealable. That judgment clearly preserved Slagter's fundamental right to have this Court's findings and conclusions of law reviewed by the district court. Stonecraft is now asking this Court to amend the enforcement provisions of its judgment for the express purpose of depriving Slagter of this right

The notion that a change that seeks to obliterate Slagter's rights under 28 U.S.C. § 157 is permissible under Rule 60(a) simply because it only affects when and how the judgment is to be enforced is preposterous. There is no caveat in West Texas Marketing Group, Britt v. Whitmire, or in any other case, saying that the prescribed limitation on the scope of Rule 60(a) does not apply when a change only affects those rights that relate to when the judgment becomes enforceable. The limitation placed on the application of Rule 60(a) by the Fifth Circuit Court of Appeals does not specify or eliminate any particular category of "rights". Rather, a change is outside the scope of Rule 60(a) if it affects any substantive/substantial right of the parties.

Courts have even precluded the application of Rule 60(a) if the change would affect the parties' rights in business transactions or litigation occurring outside the context of the ease in which the judgment was entered. In Olle v. Henry & Wright Corp., 910 F.2d 327, 363-6 I (6th Cir. 1990) the court pointed out that since: "The error here certainly affected the rights of the parties in their commercial relationships and other litigation. We are satisfied that Rule 60(a) does not provide an

avenue of relief because substantial rights of the parties are involved and there was no mere clerical mistake or oversight by the court". See Olle, 910 F2d at 364.

The same is true in the case at bar. Stonecraft's ability to consummate its sale of the patent rights awarded in the judgment turns on the change at issue in the instant motion. The United States Bankruptcy Court for the Western District of Michigan has approved a Chapter 13 plan for Slagter which is premised on Slagter's right to proceed with this appeal and to retain title to the patent in the event he is successful on appeal. Clearly, the change requested by Stonecraft affects the rights of the parties in their commercial relationships and other litigation.

And there was no mere clerical mistake. The language at issue was riot the result of a "clerical" mistake. This Court even restated its ruling, using different words, in a subsequent order. In the order confirming the auction sale of the patent, this Court stated: *"The court ordered Slagter to transfer the patents and intellectual property to Stonecraft within 10 days following the date that the judgment became final and non-appealable pursuant to an assignment form which was appended to the judgment The text of the judgment is incorporated herein by reference"*. There was no mindless clerical, typographical, or mechanical error.

THEREFORE, premises considered, Defendant, John Slagter respectfully requests that this Honorable Court deny Stonecraft's Combined Motion for Relief from Judgment and for Enforcement of Judgment.

Dated 1-5-05

s/John Slagter
John Slagter, *in pro per*
1763 Watermark Dr. SE
Grand Rapids, MI 49546

CERTIFICATE OF SERVICE

I John Slagter do hereby certify that on this day, 1-5-05, I caused to be mailed, postage prepaid, a true and complete copy of the foregoing "Response to Combined Motion for Relief from Judgment and Enforcement of Judgment" to the following:

William Little, Jr.
Lent.z & Little, P.A.
P0 Box 22642
Jackson, MS 39225-2642

Betty Ruth Fox
Office of the US. Trustee
100W. Capitol Street, Suite 706
Jackson, MS 39269

Honorable David W. Houston UI
United States Bankruptcy Court
703 Highway 145, North
Aberdeen, MS 39730

s/John Slagter
John Slagter, *in pro per*
1763 Watermark Dr. SE
Grand Rapids, MI 49546

APPENDIX J- Reply to Stonecraft's Response to Objection to Entry of Amended Judgment, Filed January 23, 2006

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

STONECRAFT, LLC	Chapter 11 Case No. 03-05229 WDH
Debtor	
_____/	
STONECRAFT, LLC No. WDH Plaintiff— Appellee	Adversary Case 03-00173
V.	
JOHN SLAGTER Defendant—Appellant	FILED JAN 23 2006

REPLY TO STONECRAFT'S RESPONSE OBJECTION TO ENTRY OF AMENDED JUDGMENT

NOW COMES Defendant, John Slagter, and files his Reply to Stonecraft's Response to Objection to Entry of Amended Judgment in the above styled and numbered adversary case (the "Adversary Case") as follows:

I. Stonecraft's allegation that Slagter impliedly consented to this Court's assumption of jurisdiction over the Adversary Case is absurd. Slagter filed "Defendant's Motion to Dismiss and Abstain front Adversary

Proceeding" and his answer conterminously. There was loud, clear and unambiguous refusal of consent as Slagter expressly objected to this Court's assumption core jurisdiction over the Adversary Case.

2. Stonecraft's argument that Slagter's prosecution of an appeal from this Court's April 22,2005 judgment can be construed as implied consent to entry of that judgment is also ridiculous. This Court ruled that the Adversary Case is a core proceeding and thus presumed jurisdiction to enter a judgment. Slagter has no choice but to proceed with an appeal from that judgment pending a determination by an appellate court that this Court's assumption of jurisdiction was improper.

3. Slagter' s instant objection to entry of an amended judgment simply reasserts the issues raised in his motion for abstention. The Adversary Case is a non-core proceeding, therefore, this Court's assumption of subject matter jurisdiction pursuant to 28 U.S.C. §157(b)(2)(A), (B), (B), and (0) is erroneous.

4. The Adversary Case is a cause of action based exclusively on state law claims.

5. The United States Supreme Court held in Northern Pipeline Construction Co. v. Marathon Pine Line Co., 458 U.S. 50 (1982) that the exercise of jurisdiction by a

bankruptcy court over a cause of action based on state law is unconstitutional. Only district courts, with their Article III status, have the right and the power to adjudicate state law controversies related to cases under Title 11.

6. The Supreme Court subsequently reiterated that; "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants and subject only to ordinary appellate review." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S., 568,584, 105 S. Ct. 3325, 3334-335, 87 S.Ed.2d 409, 722 (1985).

7. The judgment entered by this Court on April 22, 2005 complied with the limitations on bankruptcy court jurisdiction prescribed by the Supreme Court in cases such as Marathon and Thomas v. Union Carbide Agric. Prods. Co.

8. By ordering: *"That the said transfer from the defendant to the plaintiff shall be completed within 10 days following the date that this judgment becomes final and non-appealable"*, this Court's April 22, 2005 judgment clearly preserved Slagter's fundamental right to a fresh evaluation of this state law dispute by an. Article III district court judge.

9. Stonecraft is now asking this Court to amend its April 22, 2005 non-final judgment making it into a final and immediately enforceable judgment for the express purpose of depriving Slagter of his constitutional and statutory right of review by the district court.

10. Slagter continues to assert that pursuant to 28 U.S.C § 1334(c)(2) this Court must abstain, and pursuant to 28 U.S.C. § I57(c)(1), this Honorable Court lacks subject matter jurisdiction to enter a final, enforceable judgment in this Adversary Case.

11. Slagter objects to entry of an amended judgment.

WHEREFORE, premises considered, John Slagter respectfully requests that this Honorable Court submit its proposed findings and conclusions of law to the United States District Court for the Southern District of Mississippi.

Dated: January 21, 2006

s/John Slagter

John Slagter, *in pro per*
1763 Watermark Dr. SE
Grand Rapids, MI 49546
(616) 915-5715

APPENDIX K - Jurisdiction and Structure of the Bankruptcy Court, National Bankruptcy Review Commission, Section "Constitutionality of Current Bankruptcy System" (pp. 732-735)

B. Constitutionality of Current Bankruptcy System

The Supreme Court has not ruled on the constitutionality of the 1984 amendments. The issues raised by the Court in *Marathon* such as the adjudication of public v. private rights, whether consent of the parties satisfies Article III infirmities, and others that are determinative of the limits of an non-Article III court are nebulous at best. 1774 Even with the delineation of core proceedings in section 157(b)(2), the precise authority of a bankruptcy judge to adjudicate certain matters cannot be authoritatively answered today, thirteen years after BAFJA.

The delineation between core and noncore proceedings remains in considerable dispute. Uncertainty creates fertile ground for delay tactics that force the estate to engage in wasteful litigation over the jurisdiction of the court. In an effort to make the current system work, however, some courts find that certain issues are core proceedings even though they bear a marked resemblance to the issues in *Marathon*. For example, some courts have held that an action to recover an outstanding account receivable of the debtor is a core proceeding that may be decided by the bankruptcy judge. 1776

Footnote 1775
See Granfinanciera, S.A. v Nordberg, 492 U.S. 33

(1989); Commodity Futures Trading Comm'n v Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods., 473 U.S. 568 (1985).

Footnote 1776
Under 28 U.S.C. § 157 (b)(2)(C) counterclaims are listed as core proceedings.

While other parts of BAFJA are questionable, no case has been reviewed by the Supreme Court rasing a constitutional contest on the core/noncore distinction. Whether permissive counterclaims are truly core proceedings as Congress has states is questionable. (Fn1777) A recently proposed amendment to section 157(c) might have been the catalyst for Supreme Court involvement if enacted. It provided for the entry of a final order by the bankruptcy judge in a noncore proceeding if, after the hearing, no objection is raised to the proposed findings of fact and conclusions of law submitted by the bankruptcy judge. As a result, parties to noncore bankruptcy proceedings would be bound by a final order entered by a Non-Article III bankruptcy judge, unless they object to the proposed findings of fact and conclusions of law. This provision would further attenuate the core/noncore distinction by giving bankruptcy judges the power to do that which BAFJA forbid in light of *Marathon*: enter final orders in noncore proceedings. Whether such implied consent alleviates the Article III requirement is problematical but untested. This provision was in the Federal Courts Improvement Act of 1996 but was deleted in the House just before the Act was passed. (Fn1778)

Footnote 1776

See In re Baldwin-United Corp., 48 B.R. 49 (Bankr. S. D. Ohio 1985) ("the collection of debtor's accounts receivable and other assets is a critical part of the administration of the bankrupt estate traditionally pursued in the Bankruptcy Court."); *In re* Belles Terres Partners, No. 85 C 5355, 1985 WL 3443 (N.D. I11. 1985) (breach of contract, conversion, and tortious interference with business relations called core proceedings); *In re* L.A. Clarke and Sons, 51 B.R. 31 (Bankr. D.D.C. 1985) (action to collect accounts receivable and defendant's breach of contract counterclaim are core proceedings).
Footnote 1777
Under 28 U.S. C. § 157(b)(2)(C) counterclaims are listed as core proceedings.

1. *Grandfinanciera, S.A. v. Nordberg* 1779

The Supreme Court has never ruled on the constitutionality of the core/noncore distinction. The closest it has come was in Granjmnanciera where it held that a party who had not filed a claim against the debtor retained its Seventh Amendment right to a trial by jury of the fraudulent transfer action seeking a money judgment filed by the trustee. (Fn1780) The Supreme Court found that the defendant retained a right to a jury trial despite the fact that section 157(b)(2)(H) defines an action to avoid a fraudulent transfer as a core proceeding. (Fn 1781) In so holding, the Court found that Congress could not delegate a private legal right of action to a non-Article III tribunal without violating a litigant's Seventh Amendment right to a jury trial. (Fn 1782)

As a result of the Supreme Court's decision in *Granfinanciera*, the issue of jury trials under the Seventh Amendment and the ability of the bankruptcy judge to conduct a jury trial is subject to strategic consideration and delay tactics by attorneys.(Fn 1783) For example, something as simple as a jury request in response to the debtor's complaint seeking to enforce certain prepetition contract rights halts the debtor's action and raises a series of time-consuming threshold issues that must be resolved before the substance of the debtor's action can proceed.

Footnote 1778
Pub. L. No. 104-317, 110 Stat. 3847 (signed Oct. 19, 1996).

Footnote 1779
492 U.S. 33 (1989).

Footnote 1780
Id. at 36.

First, a determination must be made whether the debtor's action is a core or noncore proceeding. Whether an action seeking to enforce a contract right is a core proceeding is the subject of considerable conflict in the courts and is not easily discerned. (Fn 1784) If the proceeding is found to be core, the court must determine whether the defendant has a right to a jury trial. If the defendant has a right to a jury trial, the court must determine whether the defendant has waived its right to a jury trial.(Fn 1785) If the defendant has not waived its right to a jury trial, the parties

consent, and the district court has authorized the bankruptcy court in that district to conduct jury trials,

Footnote 1781
Section 157(b)(2)(H) provides that "Core proceedings include, but are not limited to...(H) proceedings to determine, avoid, or recover fraudulent conveyances;..."

Footnote 1782
Granfinanciera, 492 U.S. at 54. The Court concluded that "[i]f a statutory right is not closely intertwined with a federal regulatory program that Congress has the power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court: If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee ofajury trial." *Id.* at 54-55.

Footnote 1783
For example, in a recent decision, *In re* Green, 200 B.R. 296 (S.D.N.Y. 1996), the district court withdrew an entire adversary proceeding (commenced to determine the dischargeability of a claim under section 523(a) and (d)) because the third-party complaint of the debtor raised noncore issues, a timely demand for a jury trial was made by third-party defendant, and the bankruptcy court may not conduct the jury trial.

the bankruptcy judge may hear the proceeding.(Fn 1786) If any of these prerequisites are missing, the action must be litigated in the district court.

Granfinnanciera erodes the basic principle of the current jurisdictional scheme that the core proceedings listed (Fn 1787) in section 157(b)(2) are entirely and appropriately within the jurisdiction of the bankruptcy court. Core proceedings are never defined in the Bankruptcy Code. The list of core proceedings in section 157(b)(2) is not an exclusive list. As a result, whether a proceeding is a core proceeding or not may always be the subject of a dispute between the parties. If all core proceedings are subject to disagreement, debtors and creditors are at the mercy of parties who can afford to litigate the bankruptcy court's authority until the other party capitulates. Needless litigation depletes the estate of resources and unsecured creditors as a result receive very little or nothing at all. Bankruptcy jurisdiction must be clearly defined in order for the bankruptcy system to benefit creditors and debtors by avoiding cost and delay.

Footnote 1784
Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion), 4 F.3d 1095 (2d Cir.1993) (holding that action on the alleged prepetition breach of a prepetition contract was a noncore proceeding and bankruptcy court could not conduct the jury trial), *cert. dismissed*, 114 S. Ct. 1418 (1994); Ben Cooper, Inc. v. Insurance Co. of Pennsylvania (*In re* Ben Cooper), 896 F.2d 1394 (2d Cir. 1990) (holding that action on alleged postpetition breach of postpetition contract was a core proceeding), *vacated on other grounds*, 111 S. Ct. 425 (1990), *reinstated*, 924 F.2d 36(1991).

Footnote 1785

See, e.g., Langenkamp v. Culp, 498 U.S. 42,44(1990) (creditor who filed proof of claim against debtor's estate waived Seventh Amendment right to jury trial) *reh 'g denied*, 498 U.S. 1043 (1991).

Footnote 1786

The bankruptcy judge may conduct a jury trial in a core proceeding if the applicable district court has so designated and the parties consent. 28 U.S.C. § 157(e) (1994).

Footnote 1787

Even more surprising is the fact that section 157(b)(2) is not meant to be an exclusive list of all core proceedings. Notwithstanding the specific reference to fraudulent transfer actions in section 157(b)(2)(H), the implication of *Granfinanciera* calls into question all core proceedings, whether listed or not.

APPENDIX L- 28 U.S.C.A. § 157

Sec. 157. Procedures

-STATUTE-

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to
(A) matters concerning the administration of the estate;
(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
(C) counterclaims by the estate against persons filing claims against the estate;
(D) orders in respect to obtaining credit;
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover

preferences;
(C) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; (Fn 1)
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.".

Footnote 1
'BAPCPA: PUBLIC LAW 109—8—APR. 20, 2005
119 STAT. 145

(C) AMENDMENTS TO TITLE 28, UNITED STATES CODE.— (1) PROCEDURES.—Section 157(b) (2) of title 28, United States Code, is amended—
(A) in subparagraph (N), by striking "and" cit the end;

(B) in subparagraph (0), by striking the period at the end and inserting "; and"; and
(C) by adding at the end the following:
'(P) recognition of foreign proceedings and other matters under chapter 15 of title 11."....
End Footnote-

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Nor -core proceedings under section 157(b) (2) (B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c) (2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be fried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall

be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial, applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

-SOURCE

(Added Pub. L. 98-353, title I, Sec. 104(a), July 10,

1984, 98 Stat. 340; amended Pub. L. 99-554, title I, Secs. 143, 144(b), Oct. 27, 1986, 100 Stat. 3096; Pub. L. 103-394, title I, Sec. 112, Oct. 22, 1994, 108 Stat. 4117.)

88

Supreme Court, U.S.
FILED

071208 MAR 18 2008

(1) OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN SLAGTER,
Petitioner,

v.

STONECRAFT, LLC,
Respondent,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. 28 U.S.C.A. § 157(c)(2) of the Bankruptcy Code provides that "the district court, **with the consent of all of the parties to the proceeding**, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title." The principal question on Writ of Certiorari is whether this provision violates Art. III of the United States Constitution for the reason that it violates the Article III, § 1 safeguards for an impartial and independent federal adjudication of claims, as well as the constitutionally mandated system of checks and balances.

2. In the event that the United States Supreme Court concludes that 28 U.S.C. § 157(c)(2) of the Bankruptcy Code does not violate Art. III of the United States Constitution, the second question concerns the permissible scope and interpretation of the concept of "consent," and, more specifically, did the United States Fifth Circuit Court of Appeal err herein as a matter of law in finding that Appellant, John Slagter, consented to having the bankruptcy judge for the S.D. Mississippi make a final determination and enter orders and judgments concerning the state law non-core adversary proceeding for which there would otherwise be no federal court jurisdiction.

3. In the event that the United States Supreme Court concludes that 28 U.S.C. § 157(c)(2) is unconstitutional and/or Appellant did not consent to final judgment and order by the bankruptcy judge, the third question is whether the U.S. District Court for the S.D. Mississippi erred in dismissing Appellant's appeal on the basis of the "equitable mootness" doctrine without first determining whether the Bankruptcy Court had subject matter jurisdiction to render and enforce a final judgment, and whether the Bankruptcy Court should have abstained from hearing the case.

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The opinion of The United States Court of Appeals, Fifth circuit was unpublished, and reprinted at App. A, p.1.

The opinion of the district court is reported at 2006 WL 1520529, , S.D.Miss., June 1,2006 (No.3:05-CV-560BN, 3:05-MC-26JCS), and reprinted at App.E, p.57

The opinion of the bankruptcy court is reported at 322 B.R. 623 (Bankr.S.D.Miss.2005), and reprinted at App. B p. 4.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISIONS,STATUTES, ORDINANCES INVOLVED IN THE CASE

Article III of the United States Constitution

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be

diminished during their continuance in office. Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states; –between a state and citizens of another state;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason

unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Federal Bankruptcy Rule 7012

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

2. **(a) When presented.**

If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 20 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and

shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of a more definite statement.

(b) Applicability of Rule 12(b)-(h) F.R.Civ.P.

Rule 12(b)-(h) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non- core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

28 U.S.C.A. § 157...Reproduced in Appendix L at p.112.

STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The underlying dispute at issue in the adversary proceeding filed by Stonecraft, Inc., the Respondent-Debtor, involves the ownership of a patent that was invented by Appellant John Slagter. At the time that Stonecraft initiated the adversary proceeding in the S.D. Mississippi bankruptcy court, the identical issues were being litigated in Michigan state court in a case that had been pending for more than two years prior to the filing of Stonecraft's bankruptcy. There cannot be any doubt that the dispute was non-core in nature; in fact, Appellee Stonecraft conceded that it was a non-core proceeding. Further, the Fifth Circuit itself in its ruling in this case noted that it was a "non-core proceeding".

Nevertheless, despite the non-core nature of the proceeding, the bankruptcy court rendered a final judgment and orders prior to de novo review as required by 28 U.S.C.A. § 157(c)(1). The Fifth Circuit held that "the appellant, John Slagter **impliedly consented** to the bankruptcy court rendering final judgment in an adversary proceeding thereby treating this non-core proceeding as though it were a core proceeding." The Fifth Circuit ruling was the first ruling in this case on the consent issue: the United States District Court for the S.D. Mississippi dismissed Appellant's appeal on the basis of the

"equitable mootness" doctrine without first determining whether the Bankruptcy Court had subject matter jurisdiction to render and enforce a final judgment, despite Appellant's express request that it do so.

Appellant submits that the facts show that he did not expressly or even impliedly consent to the bankruptcy court asserting the jurisdiction of an Art. III court and rendering a final judgment and orders. He at all times expected to receive full de novo review of the bankruptcy court's findings of fact and conclusions of law. However, more fundamentally, he submits that 28 U.S.C.A. § 157(c)(2) violates Art. III of the United States Constitution for the reason that it violates the Art. III, § 1 safeguards for an impartial and independent federal adjudication of claims, as well as the constitutionally mandated system of checks and balances. Appellant submits that it does.

Even in the event that the Supreme Court concludes that § 157(c)(2) does not violate Art. III of the United States Constitution, the Fifth Circuit erred in its factual finding that Appellant "impliedly consented" to the bankruptcy court's assumption of full Art. III subject matter jurisdiction in the case. However, and more fundamentally, the Fifth Circuit erred in its assumption that all that is required is "implied" consent. There is a conflict among the circuits concerning the issue of "consent" under § 157 (c)(2).

Congress mandated in Rule 7012(b) that a

party must expressly consent to permit the bankruptcy court–an Art. I court–to enter judgments and orders; that is, to waive his right to full de novo review by an Art. III court. Appellant submits that not only did Congress mandate that consent be express, but further, express consent is or should be a requirement in order to comport with constitutional law to ensure that a party does not through ignorance, error, or lack of persistent objection, unintentionally waive his right to Art. III review.

Finally, Appellant submits that the Fifth Circuit erred in affirming the dismissal of Appellant's appeal on the basis of the "equitable mootness" doctrine. The district court did not first determine whether the bankruptcy court had subject matter jurisdiction to render and enforce a final judgment; "equitable mootness" cannot trump the constitutional right to Article III review.

ARGUMENT

I. SUMMARY OF ARGUMENT

In 1982, the United States Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipeline Co., et al.*, 458 U.S. 50, 102 S.Ct. 2858 (1982) that the broad Congressional grant of jurisdiction to bankruptcy judges in the 1978 Bankruptcy Act violated Article III of the United States Constitution, which requires that judicial power of the United States be exercised by judges who have life tenure and protection against salary diminution. In response to *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. In the 1984 Act, Congress "divided its jurisdictional grant into 'core' proceedings, over which the bankruptcy courts exercise full judicial power– and 'otherwise related' or 'non-core' proceedings– over which the bankruptcy courts exercise only limited power." *In the Matter of Wood*, 825 F.2d 90 (5th Cir. 1987).

28 U.S.C.A. §157(c)(1) defines the limit on the judicial power of the bankruptcy courts over "non-core" proceedings." Although a bankruptcy judge may hear a non-core proceeding that is "otherwise related" to a case under title 11, "[i]n such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any part has timely and specifically objected." This

section was clearly intended to preserve and protect a party's right to have an Article III court make the ultimate, de novo determination of his claims or defenses. Indisputably, the purpose and effect of this section was to safeguard an impartial and independent federal adjudication of claims, and comply with the constitutional mandated systems of checks and balances.

However, Congress followed §157(c)(1) with §157(c)(2), which provides that "[n]otwithstanding the provisions of paragraph (1) of this subsection, the district court, **with the consent of all the parties to the proceeding**, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title." [Emphasis supplied.] Three years later, in 1987, Congress amended Bankruptcy Rule 7012(b) to provide that "[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. **In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.**"

In the case presented here, the United States Fifth Circuit held that "the appellant, John Slagter **impliedly consented** to the bankruptcy court rendering final judgment in an adversary proceeding thereby treating this non-core proceeding as though it were a core proceeding." (P. 2, emphasis added.)

The Fifth Circuit described this as the only "significant issue" in the case. The Fifth Circuit ruling was the first ruling in this case on the consent issue: the United States District Court for the S.D. Mississippi dismissed Appellant's appeal on the basis of the "equitable mootness" doctrine without first determining whether the Bankruptcy Court had subject matter jurisdiction to render and enforce a final judgment, despite Appellant's express request that it do so.

The principal question before the Supreme Court on this Writ of Certioriari is whether § 157(c)(2) violates Art. III of the United States Constitution for the reason that it violates the Art. III, § 1 safeguards for an impartial and independent federal adjudication of claims, as well as the constitutionally mandated system of checks and balances. Appellant submits that it does.

However, even in the event that the Supreme Court concludes that § 157(c)(2) does not violate Art. III, the Fifth Circuit erred in its factual finding that Appellant "impliedly consented" to the bankruptcy court's assumption of full Art. III subject matter jurisdiction in the case. However, and more fundamentally, the Fifth Circuit erred in its assumption that all that is required is "implied" consent.

Congress mandated in Rule 7012(b) that a party must expressly consent to permit the bankruptcy court–an Art. I court–to enter judgments and orders; that is, to waive his right to full de novo review by an Art. III court. Further, express consent is or should be a requirement in order to comport

with constitutional law to ensure that a party does not through ignorance, error, or lack of persistent objection, unintentionally waive his right to Art. III review.

Finally, Appellant submits that the Fifth Circuit erred in affirming the dismissal of Appellant's appeal on the basis of the "equitable mootness" doctrine. The district court did not first determine whether the bankruptcy court had subject matter jurisdiction to render and enforce a final judgment; "equitable mootness" cannot trump the constitutional right to Article III review.

II. Factual Background

The questions before this Court do not require an in-depth analysis of the merits of the underlying adversary case. The dispute between Appellant and the debtor, Stonecraft, involves the ownership of a patent that was invented by Appellant. At the time that Stonecraft initiated the adversary proceeding in the S.D. Mississippi bankruptcy court, the identical issues were being litigated in Michigan state court in a case that had been pending for more than two years prior to the filing of Stonecraft's bankruptcy. There cannot be any doubt that the dispute was non-core in nature; in fact, Appellee Stonecraft conceded that it was a non-core proceeding, through its failure to challenge this characterization at any time, including in its briefing on the mandatory abstention issue or in its appeal brief to the Fifth Circuit. Further, the Fifth Circuit itself in its ruling in this case noted that

it was a "non-core proceeding".[1]

The following summary will acquaint the Court with the history of the business relationship between the parties.[2]

The J. Slagter & Son Construction Company has been in the concrete roadway and bridge business in the State of Michigan since 1955. Appellant, John Slagter, began working in the business when he graduated from high school, and developed a strong interest in concrete technology. He set up his own

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1 Fifth Circuit ruling, at p. 2: "[O]nly one significant issue is presented: whether the appellant, John Slagter, implied consented to the bankruptcy court rendering final judgment in an adversary proceeding **thereby treating this non-core proceeding as though it were a core proceeding.**" (Emphasis supplied.) *See also, In the Matter of Wood, supra,* which held that **a proceeding is "core" under Section 157 "if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."** There, as here, the case did not meet the test and was therefore a "non-core" proceeding, because it was "not based on any right created by the federal bankruptcy law. It is based on state created rights. It is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court." *Id. at p. 97.*

2 The facts set forth are supported by the trial transcript; *e.g.* trial exhibits P-01, D-1, D-2, D-3, P-01, P-05; *e.g.* Ex. D-25, D-29; Tr. 1/19/05, p. 171. *e.g.* also Stonecraft counsel's closing argument, Tr. 1/21/05, p. 26; *e.g.* Tr. 1/18/05, p. 150; Ex. P-25; *e.g.* Tr. 1/19/05, p. 180; Exh. D-5 and D-32; *e.g.* Tr. 1/19/05, p. 184; Bankruptcy Court's Opinion, Appendix B,;and *e.g.* Tr. 1/19/05, at pp. 178-211.

laboratory, and experimented with concrete materials over a period of many years. In approximately 1989, he developed and made samples of the polymer cement composite technology that is the subject of the patent at issue.

In 1993, Appellant formed Stonecraft, Inc. for the express purpose of developing products from a fiber reinforced cement ("FRC") technology developed at Northwestern University. FRC technology is distinct from the technology of the Patent. FRC is a material in which fibers impart tensile strength and flexibility to an otherwise brittle material. The patent in the adversary proceeding does not use fibers; it relies on the interaction between cement and polymer chemicals to achieve flexibility.

While in the process of seeking out investors, Appellant met Milton Kuyers, the lead investor for a group interested in Appellant's business plan to make and sell FRC products. Based upon Kuyers' representations, Appellant agreed to locate the business in Mississippi, with financing to be provided by Kuyers and his group.

Stonecraft, LLC, a limited liability company formed under the laws of Michigan, was created for the purpose of making and selling products created from FRC materials. As part of the agreement between Appellant and Debtor, Appellant was engaged to manage Stonecraft. Under his guidance, Stonecraft successfully produced FRC material, and the technology remains viable as of this day. However, after Stonecraft began operations to manufacture and market the floor tile product from FRC material, the company was presented with a

new business opportunity in the roofing industry. The FRC material could not meet roofing product requirements, but the polymer cement technology invented by Appellant years prior to his involvement with Stonecraft could. Stonecraft's members authorized Slagter to evaluate his technology to take advantange of the roofing industry opportunity.

In February,1998, Stonecraft employed Harvey DeFord to assist with commercialization of Appellant's invention. DeFord assisted Appellant in preparing the information for the patent application, and represented to Stonecraft's patent attorney that John Slagter was the sole inventor.

In March, 1999, at a trade show, Stonecraft introduced a floor tile product made from the patented technology. The members of Stonecraft were pleased with the interest shown in the product at the trade show, and they agreed to invest an additional $1,000,000 in the company. However, despite Appellant's multiple requests that the members honor their agreement to fund the $1,000,000, they failed to do so. Without the investment, Appellant could not implement the business plan. Appellant believes that Kuyers and other members of the Company, upon learning of the product's potential for success, intentionally engaged in a course of conduct designed to result in Appellant's dismissal from the Company.

In October, 1999, the members of Stonecraft informed Appellant that they would not make any further investment in Stonecraft unless and until the Operating Agreement was amended to remove Appellant's right to obtain a fifty percent ownership

interest in the company. In March, 2000, after extensive negotiations and a mediation, an agreement was reached between the parties. Stonecraft's members signed the documents memorializing the agreement on April 6, 2000. Two months later, on June 6, 2000, Appellant was terminated as Stonecraft's manager.

III. Procedural Background.

After Appellant was terminated from his employment, he provided written notice to Stonecraft that the patent application was his property, and not the property of Stonecraft. Stonecraft, acting through Kuyers, filed a lawsuit in Kent County Circuit Court in the State of Michigan, seeking an order to compel an assignment of the patent from Slagter.

The Michigan lawsuit was filed on October 17, 2000. Discovery was conducted over the next two years. A pre-trial case evaluation conference was scheduled for May, 2003. However. prior to the conference date, the Kent County Circuit Court entered an opinion in a related case,[3] In its Findings of Fact, the Kent County Circuit Court found that *Stonecraft had agreed that Slagter was the owner of the Patent.*[4] This finding undoubtedly caused Stonecraft much concern about the fate of its lawsuit in that same court. On March 17, 2003, less than one

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3 Miller, Canfield, Paddock & Stone v. Stonecraft, Case No. 01-10912-CK of Kent County Circuit Court, Michigan.

4 See Opinion of Kent County Circuit Court, Findings of Fact, R. at T. Vol. 3, pp. 775-777.

month after that ruling, in a blatent attempt at forum shopping, Stonecraft filed for Chapter 11 bankruptcy protection in Mississippi, and requested a voluntary stay of the state court proceeding.

On August 18, 2003, Stonecraft filed this adversary proceeding against Appellant. Months later, Stonecraft amended the complaint in the adversary proceeding, which amendment was a verbatim restatement of the claims asserted in the Michigan state lawsuit. Appellant filed a motion for mandatory abstention, in which he clearly contended that the matter was non-core. As stated earlier, Appellee did not oppose this characterization, and the mandatory abstention issue was argued solely on the issue of whether the litigation could be timely adjudicated in the Michigan court.[5]

When the mandatory abstention request was denied by the bankruptcy court, Appellant, in his answer to the adversary proceeding, expressly denied that the matter was a core proceeding. **He never signed any document or made any affirmative statement in which he agreed that the court could render a final judgment and orders in this non-core proceeding.**[6]

The trial of the adversary proceeding was held on January 18-21, 2005, before the United States bankruptcy court, Bankruptcy Judge David W. Houston, III, presiding. Judge Houston rendered his

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5 Appellant contended that it could; the bankruptcy court ruling failed to address the issue substantively.

6 Appendix , G.

Opinion on March 10, 2005.[7] On April 22, 2005, he entered a judgment, and ordered Appellant to transfer the patents and intellectual property to Stonecraft within ten days following the date that the judgment became "final and non-appealable."[8] The bankruptcy court stated in its Opinion that it had jurisdiction of the subject matter, finding without any analysis that it was "a core proceeding," which it clearly was not. The Court concluded that Appellant "occupied a fiduciary relationship to Stonecraft," and consistent with Michigan law, Slagter "held as trustee for Stonecraft any benefit that he derived from the development of the patent." The Court then stated that Appellant would be ordered to transfer the patent to Stonecraft. The Mississippi bankruptcy court misinterpreted Michigan state law, and Appellant timely appealed to the district court.

On October 20, 2005, in response to Stonecraft's motion to enforce the April 22, 2005 judgment, and prior to the district court taking up the appeal, the bankruptcy court *amended* its judgment to, in its words, "correct" the language that protected Appellant's right to *de novo* review. The new language provided that the transfer "shall be completed within 10 days following the date that this judgment is entered."[9] For the first time, Appellant, who had relied on the language of the April 22, 2005 judgment that transfer would not be required until

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7 Appendix, B.

8 Appendix, C.

9 Appendix, D.

"ten days following the date that the judgment became final and non-appealable," became aware that he would be denied an opportunity for *de novo* review of the April 22, 2005 bankruptcy court judgment.

Upon receipt of the October 20, 2005 amended judgment, Appellant, by then representing himself because of his inability to afford legal counsel, immediately filed his "Motion for Relief from Judgment" with the District Court, in which he argued that the bankruptcy court lacked jurisdiction to enter its amended judgment. During the course of briefing he specifically argued that "[p]ursuant to 28 U.S.C. § 157(c)(1) a bankruptcy court may hear a proceeding that is not a core proceeding, however, in such proceeding, the bankruptcy judge is to submit proposed findings and conclusions of law to the district court, and, after *de novo* review, final judgment is to be entered by the district court. **Appellant never consented to entry of judgment by the bankruptcy court.**"[10] The district court refused to address this significant issue of constitutional import and the bankruptcy court was permitted to enter the judgment on January 5, 2006.

After the bankruptcy court entered the judgment, it approved, over Appellant's strenuous objections, the auction and sale of the patent to Polycem, an entity formed by the members of Stonecraft for the specific purpose of acquiring the patent. The bankruptcy court permitted the auction to go forward, despite the fact that neither the

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10 Appendix, H.

bankruptcy court nor the district court had addressed Appellant's repeated argument in multiple motions that the bankruptcy court did not have jurisdiction in this non-core proceeding to issue a final judgment or orders.

On June 1, 2006, months after Appellant had raised the issue of the Bankruptcy Court's subject matter jurisdiction, the United States District Court for the Southern District of Mississippi, Judge William H. Barbour presiding, dismissed Appellant's appeal on the basis of the equitable mootness doctrine. The Court expressly noted that Appellant had moved the Court to vacate the Amended Final Judgment of the bankruptcy court, "on the grounds that the bankruptcy court lacked jurisdiction to render a final judgment."[11] However, the Court did not address the substance of the jurisdiction issue, holding instead that **"[b]ecause the Court has determined that this appeal should be dismissed under the equitable mootness doctrine, it need not reach the merits of Slagter's Motion to Vacate. The Court therefore denies the Motion to Vacate as moot."** Application of the doctrine of "equitable mootness" –an equitable remedy which should be only sparingly and cautiously applied– was completely inappropriate, because it was the premature actions of the bankruptcy court in proceeding with the auction that created the problem, despite Appellant's ongoing arguments that the bankruptcy court did not

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11 Appendix, E.

have jurisdiction to issue a judgment and order prior to de novo review by the district court.[12]

The Fifth Circuit affirmed the district court ruling, on the basis that Appellant had "impliedly consented" to the bankruptcy court's rendering of the final judgment which "thereby treat[ed] this non-core proceeding as though it were a core proceeding."

IV. 28 U.S.C.A. § 157(c)(2) Violates Art III of the United States Constitution

> "Federal courts and bankruptcy courts are courts of limited jurisdiction." [13] Bankruptcy court jurisdiction is derived from two sections of the United States Constitution: (1) Art. III, section 2, which provides that the judicial power shall extend to all cases "arising under...the Laws of the United States...."; and (2) Art. I, section 8, which grants Congress the power "to establish...uniform Laws on the subject of Bankruptcy throughout the United States...."[14]

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12 See discussion concerning Appellant's specific efforts to have the subject matter jurisdiction issue addressed, *infra.*

13 Charles A. Wright, et al., Federal Practice and Procedure § 3522, at 60 (1984).

14 See E. Scott Fruehwald, *The Related To Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake Law Review, Vol. 44, No. 1 (1995), at p. 29.

In 1978, Congress enacted the Bankruptcy Reform Act. "As part of its overall goal to create a more efficient procedure for administering bankruptcies, the 1978 Act vested broad powers in the bankruptcy courts."[15] However, in 1982, the U.S. Supreme Court decided *Northern Pipeline v. Marathon*,[16] and "declared the jurisdictional provision of the 1978 Act unconstitutional because, in short, it vested Article III judicial power in Article I judges."[17] The Supreme Court's lengthy analysis in *Northern Pipeline* of the differences between Art III and Article I judges, and the underlying considerations of the Constitution's framers, has more than pedantic value and historical interest. It is essential to keep these differences and considerations in mind in order to prevent an unintended erosion of the checks and balances carefully built into the constitutional structure:

> Basic to the constitutional structure established by the Framers was their recognition that 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny....The Federal Judiciary was therefore designed by the

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15 In re Wood, supra, at p. 90.

16 458 U.S. 50, 102 S.Ct. 2858 (1982).

17 In re Wood, at 90.

> Framers to stand independent of the Executive and Legislature– to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.
>
> ...
>
> As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that 'The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.' Art. III § 1.[18]

The Supreme Court, finding that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges [of lifetime tenure during 'good behavior'

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18 Northern Pipeline, 102 S.Ct. at 2865-66.

and no diminution of salary]," and noting that "the independence of the Judiciary [must] be jealously guarded,"[19] held that the Bankruptcy Act removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district judges and vested them in a non-Art. III adjunct. **"Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts."**[20] While acknowledging Congress' power and responsibility in connection with bankruptcy law, the Court instructed Congress that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights...."[21]

In response to *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. In this Act, Congress "divided its jurisdictional grant into 'core' proceedings, over which the bankruptcy courts exercise full judicial power– and 'otherwise related' or 'non-core' proceedings– over which the bankruptcy courts exercise only limited power."[22]

In the case before this Court, the bankruptcy court concluded, without providing any analysis for its conclusion, that the dispute before it was a "core"

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19 Id. at 2866.

20 Id. at p. 2880.

21 Id. at p. 2872.

22 In re Wood, at p.91.

proceeding. It was not. *Even Stonecraft conceded during the mandatory abstention proceeding that the adversary proceeding is non-core.* The bankruptcy court, by rendering a final judgment, violated the United States Constitution as interpreted by the Supreme Court in *Northern Pipeline*. It is clear under *Northern Pipeline* that the "placement" of jurisdiction is an essential part of subject matter jurisdiction itself. It is equally clear that Congress intended in the 1984 Act to limit the powers of a bankruptcy court in connection with non-core adversary proceedings.[23]

28 U.S.C. § 157(c)(2), permitting "consent" to jurisdiction, eviscerates the meaning of and violates the express finding of the United States Supreme Court in *Northern Pipeline v. Marathon*, 458 U.S. 50, 102 S.Ct. 2858 (1982) that the grant of jurisdiction to bankruptcy courts as to non-core state law proceedings "impermissibly remove[s] most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court...and cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." *Id.* at 2880.

Although Appellant acknowledges that this Court distinguishes between private rights—those that may be waived—and public rights—those which may not—this Court has not made such a determination in connection with the 1984 Bankruptcy Amendments or, specifically, § 157(c)(2). In *Commodity Futures Trading Commission v. Schor, et al.*, 478 U.S. 833, 106 S.Ct. 3245 (1986), the United

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23 *Id.*

States Supreme Court, quoting *Northern Pipeline*, reiterated that Article III of the United States Constitution "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances'... by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."[24] The Court further stated that "**[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III....When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.**" (Emphases supplied).[25][26]

In evaluating whether the "structural principle" was implicated in *Schor*, the Supreme Court "focused..[on] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts,

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24 Schor, 106 S.Ct. at p. 3257.

25 Id.

26 Schor involved the consideration of the compulsory counterclaim provision of the CFTC Reparation Act, not the Bankruptcy Act. *Schor* is discussed at pp.25, *infra*.

the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.*, 478 U.S. 851; 106 S. Ct. 3257. This Court, in applying these factors, noted that " **Aside from its authorization of counterclaim jurisdiction, the CEA leaves far more of the 'essential attributes of judicial power' to Article Ill courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*" This Court further noted that the** CFTC deals only with a "particularized area of law," whereas the jurisdiction of the bankruptcy courts found unconstitutional in Northern Pipeline extended to broadly all civil proceedings arising under title 11 or arising in or related to cases under title 11.

Thus, even in the face of Schor's clear, unequivocal consent to proceed before the CFTC, the Supreme Court found it appropriate and necessary to determine whether there were structural principles at issue that could not be resolved by waiver or consent.

In 1997, the National Bankruptcy Review Commission (NBRC) prepared its report concerning the 1984 Bankruptcy Amendment Act. In a section titled "Constitutionality of Current Bankruptcy System," the Commission found that "[t]he Supreme Court has not ruled on the constitutionality of the 1984 amendments. The issues raised by the Court in *Marathon* such as the adjudication of public v. private rights, **whether consent of the parties satisfies Article III infirmities** , and others that are determination of the limits of an non-Article III

Court are nebulous at best."[27]

The Commission further found that a" number of commentators have concluded that bankruptcy courts "exercise the essential attributes of the judicial function" (even in core proceedings) and are unconstitutional. Under this rationale, bankruptcy judges are not authorized to enter final orders in core proceedings and the system does not satisfy Article III."[28] Appellant argues that, at the very least, § 157(c)(2) is unconstitutional, in that **consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.** Schor, id.

Appellant further notes that under the Bankruptcy Act, and specifically § 157(c)(2) and Federal Bankruptcy Rule 7012(b), it is the bankruptcy court, and not the district court, that determines whether a matter is non-core or core. In other words, it is an Article I court, rather than an Article III court, that makes the determination of the Article I court's subject matter jurisdiction. Essentially, an Article I court can wrongfully characterize a pure state law claim–like the one here–as core, and enter a judgment and orders that can result in the deprivation of a party's rights or property, such as through the auction of Appellant's patent, before a district court ever has the

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27 Commission Report, applicable pages, attached in Appendix, K.

28 Id. at p. 736; *see, e.g.* Richard Lieb, *Can a Bankruptcy Judge Constitutionally Hear and Determine a "Core" Proceeding?*, 6 Norton Bankr.L.Adv.1 (1997).

opportunity to make a de novo review of the bankruptcy court's findings of fact and conclusions of law. This process could not be what the Supreme Court had in mind when it wrote *Northern Pipeline*, and certainly the structural principles of Article III are implicated to such an extent that consent cannot resolve the clear Article III infirmities.

Appellant respectfully contends that this case presents the appropriate facts and issues for this Court to determine whether "consent" can address the Article III infirmities of the Bankruptcy Act insofar as the Act grants full jurisdiction to Article I courts to render final judgments and orders upon the parties' consent.

V. Even if § 157(c)(2) Is Upheld As Constitutional, "Consent," Must Be Express, Not Implied, In Order To Comply With The Statute And/Or The Constitution

Even assuming that consent can cure the constitutional problem of an Article I Court rendering a final judgment in a non-core proceeding, that consent must be "express," and not implied. The bankruptcy court violated Congress' clear statutory mandate of the procedure to be followed when a bankruptcy court hears a non-core proceeding.

Appellant John Slagter could not be expected to protect the institutional interests imposed by the United States Constitution and interpreted by the United States Supreme Court in *Northern Pipeline* to expressly exclude a grant of jurisdiction to a non-Article III Court to render a final judgment in a non

core state law adversary proceeding. He did, however, attempt to protect his own interests, and his assumptions and actions were reasonable and appropriate under the circumstances of this case. Certainly, he did not intend to and did not act consistent with an intent to waive his right to a *de novo* review of the Bankruptcy Court's findings and conclusions of this very important case that involved the ownership rights to a patent of a valuable product that he invented.[29]

"Waiver" is most commonly defined as "the voluntary relinquishment or abandonment– express or implied– of a legal right or advantage.... **The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it."**[30] A right granted by the United States Constitution cannot be negligently waived. Waiver must occur through intent.

Although § 157(c)(2) does not specifically provide that a party must expressly consent to waive his right to de novo review by an Art. III court, Bankruptcy Rule 7012(b) most assuredly does: "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not

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29 Although the facts of the disputes are not before this Court, it is certainly appropriate and important to note that no one appears to dispute that Appellant Slagter was the inventor "in fact" of the product at issue.

30 See Black's Law Dictionary (8th ed. 2004). (Emphasis supplied.)

consent to entry of final orders or judgment by the bankruptcy judge. **In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."**

Rule 7012(b) was amended by Congress in 1987, three years after the enactment of 157(c)(2), and the mandate is clear.

The Bankruptcy Court for the S.D. Mississippi exceeded its authority by rendering a judgment in April, 2005, prior to *de novo* review by the District Court. However, **the judgment provided that the transfer of the patent rights "shall be completed within 10 days following the date that this Judgment becomes final and non-appealable."**[31] While it is true that Appellant did not contest the authority of the bankruptcy court to render a final judgment until seven months after he filed his appeal to the district court, it was the wording of the Bankruptcy Court's April, 2005 judgment that created the delay in Appellant's protest. Although he filed an appeal under § 158 rather than § 157, he did so because the bankruptcy court had characterized the matter as a core proceeding and had rendered a judgment. However, he was not concerned because he fully expected that the bankruptcy judgment would not be enforceable, by its own verbiage, until after de novo review by the district court.

Appellant reasonably believed from the wording of the judgment that no adverse action could

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31 Appendix, C.

be taken against him until all appeals were completed, which meant to him that all findings and conclusions would be reviewed prior to final judgment. His belief was particularly reasonable given the fact that Appellant, although represented by legal counsel during the pre-trial and trial proceedings, represented himself on appeal because of his lack of financial resources to continue to pay an attorney at that time.

On October 20, 2005, in response to Appellee Stonecraft's motion to enforce the judgment, and prior to the district court taking up the appeal, the Bankruptcy Court *amended* the judgment to "correct" the language that protected Appellant's right to *de novo* review. The new language provided that the transfer "shall be completed within 10 days following the date that this judgment is entered." [32] For the first time, Appellant became aware that he would be denied an opportunity for *de novo* review of the April 25, 2005 Bankruptcy Court judgment.

Upon receipt of the October 20, 2005 judgment, Appellant immediately filed his "Motion for Relief from Judgment"[33] with the District Court, in which he argued that the Bankruptcy Court lacked jurisdiction to enter its amended judgment. During the course of briefing he specifically argued that "[p]ursuant to 28 U.S.C. § 157(c)(1) a bankruptcy court may hear a proceeding that is not a core proceeding, however, in such proceeding, the

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32 See Appendix, D.

33 See Appendix, H.

bankruptcy judge is to submit proposed findings and conclusions of law to the district court, and, after *de novo* review, final judgment is to be entered by the district court. **Appellant never consented to entry of judgment by the bankruptcy court."** As stated by Appellant in his brief, "[t]he judgment entered by the bankruptcy court on April 22, 2005 took the foregoing limitations on bankruptcy court jurisdiction into account. The judgment ordered that Appellant execute a written form of assignment within 10 days after the date that the judgment became final and non-appealable. **That judgment clearly preserved Appellant's fundamental right to have the bankruptcy court's findings and conclusions of law reviewed by the district court before the judgment became enforceable."** The district court, inconceivably, completely ignored and failed to address this significant issue of constitutional import.[34]

On or about January 5, 2006, the bankruptcy

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34 *See, also,* Appellant's Combined Answer and Response to Plaintiff's Motion to Enforce Judgment, filed on October 3, 2005, at p. 1 and p. 9, Appendix, G; and Appellant's Response to Combined Motion for Relief from Judgment and for Enforcement of Judgment, filed January 9, 2006, Appendix, I, and Appellant's Reply to Stonecraft's Response to Objection to Entry of Amended Judgment, filed January 23, 2006, Appendix, J. These three briefs all address Appellant's right to a de novo review and his lack of consent to have the matter treated as a core proceeding. For example, in the third brief attached (Appendix, J), Appellant argued that **"There was loud, clear and unambiguous refusal of consent as Slatger expressly objected to this Court's assumption of core jurisdiction over the Adversary Case."**

court entered the Amended Judgment. The bankruptcy court then entered an order to enforce the judgment and permitted the auction and sale of the patent to Polcem, the entity made up of Stonecraft insiders that was formed solely for the purpose of acquiring the patent. The bankruptcy court permitted the sale be consummated, even in the face of the continued objections of Appellant to jurisdiction. For example, prior to entry of the Amended Judgment and the issuance of the order permitting the sale of the patent, Appellant filed an "Objection to Entry of Amended Judgment,"[35] in which he raised his right to *de novo* review of the bankruptcy judge's proposed findings of fact and conclusions of law prior to the entry of final judgment.

Clearly, Appellant believed and intended to preserve his constitutional right to have the bankruptcy court's findings of fact and conclusions of law reviewed by the district court before there was an enforceable judgment. The language of the original judgment itself, although styled a "judgment," reasonably led Slagter to the belief that his rights of de novo review by the district court were protected. Additionally, it cannot be disputed that once the district court engaged in the extraordinary act of "correcting" the judgment during a pending appeal to, effectively, substantively change it from a non-executory judgment to an executory judgment, he at

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35 See Appellant's "Objection to Entry of Amended Judgement" attached as Exhibit "A" to Appellee's "Response of Stonecraft to Motion for Termination of Stay",Appellant's Record Excerpt No.12 R., Vol 1, No.32, at USCA5 403, Appendix, F.

once protested vigorously.

This is *not* a case in which Appellant's objection "more closely resembles an afterthought than a bonafide objection," as suggested by Stonecraft in its brief to the Fifth Circuit, quoting *In re Texas General Petrolem Corp.*, 52 F.3d 1330, 1337 (5th Cir. 1995) (internal quotations omitted). Nor are the facts of this case even closely analogous to the facts of *Commodity Futures Trading Commission v. Schor, et al.*, 478 U.S. 833, 106 S.Ct. 3245 (1986), also cited by Stonecraft below, without any substantive analysis.

In *Schor,* a customer of a professional commodities broker had a debit balance in his brokerage account, and he attributed the deficit to the broker's alleged Commodity Exchange Act violations, but the broker attributed the deficit to the customer's lack of success in the market. This dispute was "typical of the disputes adjudicated in reparations proceedings...."[36] The issue before the Supreme Court was whether the Commodity Futures Trading Commission (CFTC) could constitutionally exercise the Congressional grant of authority to hear state law counterclaims brought in reparation proceedings initiated by customers.

The Supreme Court held that "Schor indisputably waived any right he may have possessed to the full trial of [his broker's] counterclaim before an Article III court." *Id.* at 3256. Appellant herein agrees– Schor *expressly* demanded that the broker proceed on his counterclaim in the CFTC reparation proceedings rather than in district court, and was

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36 Id. at 3252.

satisfied to have the dispute settled in the forum he himself had selected. In fact, it was the Court of Appeals, *sua sponte*, that raised the question of whether the CFTC could constitutionally adjudicate the counterclaims in light of *Northern Pipeline*, and not Schorr himself. Finally, it is of great significance that Schor at all times had the choice of filing his claim against the broker *either* in federal district court or before the CFTC. He had a choice; Appellant herein did not. Appellant's preference was to pursue the almost completed Michigan state court litigation to conclusion. He never waived the right to a full *de novo* review by an Article III Court, and has consistently argued that the bankruptcy court was required to abstain from hearing the patent dispute. He was ordered to litigate this Michigan state law claim in Mississippi rather than Michigan, and in bankruptcy court rather than in state court.

Although the Fifth Circuit has held in this case and in *Texas Petroleum, supra,* that only "implied consent is required, other circuits have acknowledged that express consent is mandated by Congress.

In Sheridan v. Michels, 362 F.3d 96 (1st Cir. 2004), a bankruptcy court conducted a disciplinary hearing concerning Sheridan, an attorney practicing before the court, and ultimately suspended him. Sheridan appealed to the Bankruptcy Appellate Panel ("BAP") and the BAP affirmed. On appeal to the First Circuit, Sheridan, representing himself, argued that the BAPs are only authorized to review final judgments issued by the bankruptcy court. Thus, the issue was whether the disciplinary orders issued by the bankruptcy court were "final."

The Court stated that the "finality of a bankruptcy court order depends, *inter alia*, upon whether the proceeding in which it was entered constitutes a 'core' or 'non-core' proceeding." *Id.* at p. 99. If the proceeding is non-core, the bankruptcy court may only enter a "final appealable judgment" if the litigants "have consented to the entry of a final disposition by the bankruptcy court, rather than by the district court." *Id*, at 99-100. Thus, the dispositive issue there, as here, was whether Appellant consented to the treatment of his proceeding as core.

Appellant herein refers this Court to footnote 2 of *Sheridan*, and the in-depth discussion of the applicable federal rules. Significantly, the First Circuit quotes the advisory committee's note to Fed. R. Bankr. P. 7008, which states that "A party who alleges that the proceeding is non-core shall state whether the party does or does not consent to the entry of a final order or judgment by the bankruptcy judge. **Failure to include the statement of consent does not constitute consent. Only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding."** (Emphasis supplied.)

Sheridan did not suggest that the proceeding was non-core until he submitted his post-judgment motion for reconsideration. Here, Appellant John Slagter *did* "suggest" that the proceeding was non-core from the inception, and certainly long before the January, 2005 trial. Appellant expressly denied in his Answer to the Adversary Complaint that this was

a core proceeding. Fed. R. Bankr. P. 7012 only requires this denial in a pleading; nothing else is required to preserve the objection. Further, Rule 7012 provides, in its last sentence: **"In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."**

The First Circuit acknowledged that Sheridan "to be sure...could have elected to place the issue in contention sooner, but the failure to do so can bear no inference of consent. When the district court refers a 'related to' proceeding to the bankruptcy court, no presumption attaches that the proceeding is core." *Id.* at 101. Here, even if this Court finds that Appellant's *pro se* opposition was not perfectly timed, executed and/or preserved, certainly he objected adequately and well before the final, enforceable judgment in January, 2006. Further, and of great significance, by the time the district court, in June, 2006, wrote its opinion, both the district court and the bankruptcy court had been aware for more than eight months of Slagter's vehement refusal to consent to the bankruptcy court entering and enforcing a final judgment. Unconscionably, the district court failed to address the jurisdiction issue, the consent issue, or the mandatory abstention issue. Instead, it granted equitable relief under the doctrine of equitable mootness.

The Eleventh Circuit has also acknowledged that "express" consent is required to waive the right to an Article III court. In *In re Davs* (*Gower v. FmHA*), 899 F.2d 1139 (11th Cir. 1990), the debtor

defrauded the FmHA in obtaining a loan. The debtor's Chapter 7 bankruptcy trustee brought an adversary proceeding against the FmHA to set aside preferential payments made to the FmHA during the ninety day period prior to the filing of the bankruptcy. The bankruptcy court ordered the return of the payments, but the district court reversed, holding that the trustee's claim was forfeited because of the debtor's admitted fraud against the FmHA. The Eleventh Circuit reversed the district court, ruling that because the Trustee's action was on behalf of other creditors, the debtor's fraud was irrelevant. After the district court affirmed the bankruptcy court decision, the trustee sought attorney fees and was awarded same by the bankruptcy court, which award was affirmed by the district court. The FmHA then appealed to the Eleventh **"contending, for the first time, that the bankruptcy court lacked jurisdiction to award attorney's fees under the EAJA."**

The Eleventh Circuit found that the bankruptcy court, as a non-Article III court, lacked jurisdiction to award BAJA fees. Further, the Court found that "the crucial element of consent" was lacking to authorize adjudication by the bankruptcy courts under 157(c)(2). Although the parties had consented to the bankruptcy court's jurisdiction over the underlying case on the merits, that consent did not specifically apply to the attorney fee action under the EAJA. The Eleventh Circuit, in finding that there was no consent, quoted Bankruptcy Rule 7012(b) that "[i]n non-core proceedings final orders and judgments

shall not be entered on the bankruptcy judge's order except with the *express consent* of the parties." It is significant to note that the emphasis was added by the court itself.

VI. Subject Matter Jurisdiction Must Be Determined Prior To Dismissing A Case On The Basis Of the "Equitable Mootness" Doctrine

The District Court dismissed the appeal on the basis that it was equitably moot, and stated that it "need not reach the merits of Slagter's Motion to Vacate." It therefore did not address the issues of jurisdiction and mandatory abstention raised in Appellant's motion. The District Court should have recognized at once that the adversary proceeding was a non-core dispute that arose under state law and that could not have been brought in federal court absent the bankruptcy. The Fifth Circuit affirmed the application of "equitable mootness," although on the merits of that argument, having already held that Appellant impliedly consented to have the case treated as a "core proceeding," despite the fact that the dispute was clearly non-core. The United States Supreme Court has held that **"[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."** [37] Here, the bankruptcy court's judgment that the patent

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37 Ins. Corp. Of Ireland, Ltd., et al. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099 (1982).

belonged to Stonecraft, and its subsequent related orders, were invalid because it did not have jurisdiction to render the judgment. By entering a final judgment, rather than submitting findings of facts and conclusions of law to an Article III court for review and decision, the bankruptcy court exceeded both its constitutional and statutory authority, and acted in precisely the manner that was held unconstitutional by the United States Supreme Court in *Northern Pipeline v. Marathon.* [38] Neither the

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38 Even setting aside the issues of jurisdiction and abstention, the District Court erred in dismissing the appeal as equitably moot. The District Court, citing *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), stated that "equitable mootness is appropriate where 'there has been substantial consummation of [a] plan such that effective relief is no longer available– even though there may still be a viable dispute between the parties on appeal." Here, however, effective relief is available. *In re Manges* instructed that three factors must be examined to determine whether a bankruptcy appeal is moot: (1) has a stay been obtained; (2) has the plan been substantially consummated; and (3) would the relief requested affect either the rights of parties not before the court, or the success of the plan. Here, there will be no meaningful effect on parties not before the court, particularly in light of the fact that this was a liquidation plan, rather than a reorganization plan. Stonecraft's plan of liquidation provided that essentially all of the proceeds of the sale of the patent to MK Leasing would be paid directly back to MK Leasing. Stonecraft's creditors participated in a meager pro-rata distribution of $20,000, which no creditor receiving a payment in excess of $1,000. Further, MK Leasing, owned and controlled by the same individuals who owned Stonecraft, cannot truly be considered a "third party." Nor can Polycem, an entity formed by the members of MK Leasing, to whom the patent was

doctrine of "equitable mootness" nor any other equitable doctrine should be permitted to circumvent the fundamental requirement that a court issuing a judgment or order have subject matter jurisdiction to do so.

VII. Conclusion

This case presents the appropriate facts for the Supreme Court to address the still unresolved concerns of the National Bankruptcy Review Commission as to whether consent of the parties can satisfy Article III infirmities. As noted by the Commission, the limits of an non-Article III Court are "nebulous at best."

Further, there is significant disparity between the circuits on the issue of consent, not only as to what constitutes consent, but also as to the interplay between consent and jurisdictional limitations that cannot be resolved through consent. It is the appropriate time for the conflict between the circuits to be resolved, before any further jurisprudence is created on this issue.

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transferred after the auction. There could not be a stronger case to illustrate " the dangers associates with allowing the bankruptcy court to be the de facto final decision maker of a controversy, merely by confirming a plan of reorganization and denying a motion for stay." Equitable mootness is, of course, an equitable remedy. There is no equity in permitting the insiders of Stonecraft, under all of the facts and procedural history of this case as set forth in this brief, to deprive Appellant, the inventor of the Patent, from a full review of the merits of his case.

Finally, the ruling in this case by the district court, as affirmed by the Fifth Circuit, leads to the inevitable conclusion that the doctrine of "equitable mootness" can be used to trump the paramount concern of subject matter jurisdiction. This is not and cannot be the case.

The patent at issue in the underlying litigation has great financial value and represents years of Appellant's hard work and creativity. The ownership of the patent, which can only be determined under Michigan state law, cannot be left to an Article I bankruptcy court that usurped the role of the district court, in violation of the United States Constitution.

Appellant respectfully requests that the United States Supreme Court grant his writ of certiorari, and permit him to proceed with the filing of a brief on the merits and oral argument on the important issues of constitutional import set forth herein.

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SUPREME COURT OF THE UNITED STATES

JOHN SLAGTER,

Petitioner,

V.

STONECRAFT, LLC,

Respondent,

On Petition a For Writ of Certiori To The
United States Court of Appeals For The
Fifth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

The instant Petition for Writ of Certiori is a continuation of an eight year dispute concerning ownership of a patent. The dispute has a long and tortured history and has spawned a legal cornucopia of issues, most of which are only remotely related to the ownership issue. Through the years, the involvement of five different courts has narrowed the issues to the questions Petitioner presents - whether a party may consent to entry of final judgment by a non-Article III adjunct court and, if so, whether that consent must be express or may be implied.

This Court has held that statutory provisions providing for consent to entry of a final judgment by an adjunct court are constitutional, has expressly condoned the consent statute in the bankruptcy context and has held that consent may be implied from a party's conduct. There is no reason to grant certiori in this case.

STATEMENT OF THE CASE

Slagter solicited investments from a group of individuals to form Stonecraft, LLC. The business purpose of the Company was to develop a fiber reinforced flexible concrete tile and to manufacture it in an area in need of jobs. USCA5 693 Stonecraft was organized as a Michigan Limited Liability

Company in November, 1995. It was a "manager operated" company and Slagter was designated as the manager. After encountering problems with the fiber-based product, Slagter recommended the Company not pursue the fiber based product and suggested developing a polymer-cement composite. USCA5 275, 1208.

In early 1998, Slagter hired Dr. Dale DeFord, who holds a Doctorate in Material Science, to solve problems encountered in developing the polymer-cement composite. USCA5 277 Dr. DeFord conducted experiments which resulted in a chemical composition that eliminated the problems. USCA5 276-281 In late 1998 and early 1999, Dr. DeFord prepared a draft of a patent application for the Company to file with the United States Patent and Trademark Office ("USPTO"). Since the USPTO does not allow a patent application to be filed in the name of a business entity, Slagter directed DeFord to designate Slagter as the inventor. A Patent was subsequently issued.

In 1999, Stonecraft leased a manufacturing facility from Sharkey County, Mississippi, an impoverished county in the Mississippi Delta, and moved its manufacturing operations to Sharkey County. By late 1999, after investment by the members (other than Slagter) of millions of dollars in capital and after millions of dollars of loans

guaranteed by the United States Government, Stonecraft still had not produced any product on a commercial basis. USCA5 695 The Company was dysfunctional. It became apparent to the other members that Slagter did not have the technical and managerial skills necessary to run the Company. Slagter was offered a position as "founder" with another to be hired to manage the Company. Slagter refused. In early June, 2000, the members terminated Slagter as the manager of the Company.

Shortly thereafter, Slagter asserted, for the first time, that he was the exclusive owner of the Patent and refused to execute an assignment of the Patent to Stonecraft. In September, 2000, Slagter put Stonecraft and its lenders on notice that it had no rights to manufacture or sell the product. As a result, Stonecraft was unable to obtain any additional financing. USCA5 593

In October, 2000, Stonecraft filed a complaint in state court against Slagter for a declaratory judgment (i) as to the ownership of the Patent, (ii)to compel Slagter to assign the Patent, (iii)for a declaratory judgment that Slagter's equity interest in Stonecraft should not be increased and (iv)for damages for unauthorized use of Stonecraft property, funds, and employees. In July, 2001, Slagter filed a counterclaim against Stonecraft for wrongful termination and for indemnification. Numerous

discovery disputes ensued between the parties and there were several failed attempts to settle.

While the state court action was being litigated, some of the members personally borrowed approximately $3,000,000.00 which they in turn loaned on an unsecured basis to Stonecraft. USCA5 705 However, these funds were exhausted and by 2003, Stonecraft was in default on its lease obligations to Sharkey County and on the government guaranteed loans made by the Bank of Anguilla, Enterprise Corporation of the Delta and South Delta Planning and Development District. USCA5 594 The Company's lawyers took a judgment for unpaid attorneys fees against the Company in state court.[1] With the financing from the other members being exhausted, Stonecraft determined that it should seek bankruptcy protection.

On March 18, 2003, Stonecraft filed a Chapter

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[1] Slagter suggests that a statement in the state court's opinion precipitated the bankruptcy filing for the purpose of selecting a different forum to litigate the Patent dispute. While the judgment was entered in the same court, the statement was made by a different judge than that assigned to the state court patent dispute. In any event, Slagter was not a party to that collection action by Stonecraft's attorneys and the issue was neither litigated nor necessary to the attorney's fee dispute. There is no collateral estoppel or res judicata effect to the statement in the state court's opinion as to ownership of the Patent.

11 Proceeding. In August, 2003, Stonecraft filed its adversary proceeding against Slagter to determine ownership of the Patent. The adversary proceeding was mediated on several occasions beginning in November, 2003 and continuing into 2004, but no settlement was reached.

In April, 2004, Stonecraft filed an Amended Complaint against Slagter. Shortly thereafter, Slagter substituted new counsel, Steve Skahn, a very capable and experienced Michigan trial lawyer. The Amended Complaint sought (i) turnover of all interests of Slagter in the Patent pursuant to §542 of the *Bankruptcy Code* (Count I), (ii) an imposition of a constructive trust upon the Patent (Count II) and (iii) authority to sell the Patent pursuant to § 363(h) of the *Bankruptcy Code* (Count III).[2]

In response, Slagter filed a motion to dismiss Counts I and III pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure* and to abstain as to Count II pursuant to 28 U.S.C. § 1334 (c). Slagter's primary argument was that it would be inefficient for the parties to "start over" in the adversary proceeding

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11 U.S.C. § 363(h) authorizes a bankruptcy debtor to sell its interest in property that is jointly owned with another on certain conditions. Rule 7001 of the *Federal Rules of Bankruptcy Procedure* requires an adversary proceeding to compel such a sale.

after so much discovery had been completed in the state court action. Slagter also argued that **"Any decision of this Court would be subject to review, before becoming final, by the district court."**

The motion was argued on July 12, 2004. Stonecraft agreed that all discovery in the state court action could be used in the adversary proceeding and that Stonecraft would travel to Michigan for trial depositions of Slagter's witnesses. On August 5, 2004, the Bankruptcy Court denied Slagter's motion.

Three weeks later, Slagter filed a counterclaim in the adversary proceeding asserting that in the event the Bankruptcy Court found Stonecraft to be the owner of the Patent, the Court should not require Slagter to turnover the Patent because of alleged willful and oppressive conduct of the other members of Stonecraft. USCA5 286 Slagter's counterclaim was a purely state law claim based upon §450.4515 of the *Michigan Limited Liability Act*, which provides certain remedies when the managers or members in control engage in illegal, fraudulent or willfully unfair and oppressive conduct toward one of the other members. **The counterclaim expressly requested the Bankruptcy Court to enter judgment in favor of Slagter.**

Slagter requested time for discovery and time to file a motion for summary judgment. The parties

entered into an agreed scheduling order setting deadlines for completion of discovery, dispositive motions and setting the trial for January 18, 2005. In October, November and December, 2004, eight depositions were taken in Illinois and Michigan.

On November 19, 2004, Slagter filed a Motion for Summary Judgment. **Again, Slagter requested the Bankruptcy Court to enter judgment in his favor.** There was no suggestion that the Bankruptcy Court should submit proposed findings of fact and conclusions of law to the District Court. In December, 2004, a 30 page pre-trial order was agreed upon by the parties. USCA5 260 The trial was conducted on January 18 through 21, 2005. During the trial, thirteen witnesses testified, including four expert witnesses. Also, almost 250 documents were admitted into evidence.

On March 10, 2005, the Bankruptcy Court issued an Opinion in which it held that (i) the overwhelming weight of the evidence proved that Slagter occupied a fiduciary relationship to Stonecraft, (ii) the Patent was developed at the expense of Stonecraft, (iii) the product was essential to the business purpose of Stonecraft, (iv) Slagter led the members to believe that the Patent belonged to Stonecraft and (v) Slagter held title to the Patent only as a trustee pursuant to §450.4404 of the *Michigan Limited Liability Act*. In addition, the Bankruptcy

Court held that Slagter did not invent the polymer-cement composite prior to the formation of the Company. The Bankruptcy Court found that it was Dr. DeFord, not Slagter, who developed the exact ingredients and the ratios that made up the chemical composition for flexible concrete tile. USCA5 259

Counsel for Slagter and counsel for Stonecraft agreed that the Bankruptcy Court would enter a final judgment from which Slagter's appeal time would run. However, counsel could not agree upon the form of the final judgment. On April 8, 2005, Stonecraft filed a Motion for Entry of Final Judgment. Slagter did not file a written response to Stonecraft's Motion for Entry of Final Judgment. A hearing was held on April 19, 2005, at which counsel for Slagter stated:

> **"The only concern is that the language in the final judgment not require the assignment before we have had an opportunity to file the appeal, the motion for stay and the appropriate orders."**

On April 25, 2005, the Bankruptcy Court entered its Final Judgment and an order on a motion Slagter filed for a stay pending an appeal. The Bankruptcy Court granted the stay, but conditioned it upon Slagter posting a $200,000.00 bond within ten

(10) days following entry of the order. USCA5 1211

After the Bankruptcy Court rendered its Final Judgment awarding the Patent to Stonecraft, Slagter filed no objection to the Bankruptcy Court's findings under 28 U.S.C.§157(c)(1), which provides for *de novo* district court review of the bankruptcy court's findings of fact and conclusions of law.[3] Instead, Slagter lodged his appeal to the District Court under 28 U.S.C. §158(a), the section applicable to appeals from final judgments of the bankruptcy court. On May 13, 2005, Slagter designated his issues on appeal, which did not include any error on the part of the Bankruptcy Court in finding that the matter was a core proceeding or in entering final judgment rather than submitting proposed findings of fact and conclusions of law to the District Court.

Slagter did not post the $200,000.00 bond. For the following seven months, Slagter attempted to prevent enforcement of the Final Judgment by filing a personal Chapter 13 bankruptcy and numerous motions in the Bankruptcy Court and the District Court. On January 5, 2006, Slagter suggested for the first time that he desired the District Court to review the Bankruptcy Court's findings of fact and

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Rule 9033 of the *Federal Rules of Bankruptcy Procedure* requires that objections to proposed findings of fact and conclusions of law be filed within 10 days after service.

conclusions of law on a *de novo* basis pursuant to §157(a)(1). This was even after Slagter had filed his appellate brief with the District Court, **stating that a clearly erroneous standard applied to the Bankruptcy Court's findings of facts.**

On January 30, 2006, the Bankruptcy Court entered an Amended Final Judgment in which the Bankruptcy Court specifically required Slagter to execute the assignment of the Patent to Stonecraft within ten days after entry of the Amended Final Judgment. USCA5 1212 Slagter refused. On February 13, 2006, the Clerk of the Bankruptcy Court executed the assignment on Slagter's behalf as required by the Amended Final Judgment. The assignment was forwarded to the USPTO for recordation.

Shortly thereafter, Stonecraft consummated its Plan of Liquidation and filed a motion to dismiss Slagter's District Court appeal as moot. The District Court granted Stonecraft's motion and Slagter perfected his appeal to the Fifth Circuit Court of Appeals. It is significant that Slagter never mentioned §157(c)(2) in his principal brief filed in the Fifth Circuit, and certainly didn't mention the constitutionality of that subsection. Rather, only after Stonecraft asserted the implied consent doctrine in its brief did Slagter then question the constitutionality of §157(c)(2).

This typifies the conduct of Slagter throughout the litigation. Legal and factual positions are advanced or abandoned as convenient, and without any regard for consistency.

SUMMARY OF THE ARGUMENT

In *Northern Pipeline Construction Company v. Marathon Pipeline Company*,[4] this Court held that Article III of the United States Constitution bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. In its analysis, this Court pointed out that the delegation of judicial power to bankruptcy judges lacked the procedural safeguards contained in the *Federal Magistrates Act* which permit district court judges to refer matters to a United States magistrate judge for initial determination, with the magistrate judge's recommendations being subject to *de novo* review by the district court.

After the *Northern Pipeline* ruling, Congress cured the constitutional defects contained in the 1978 *Bankruptcy Reform Act.* Congress authorized bankruptcy judges to enter final judgment with respect to "core" matters and to make proposed

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[4] 458 U.S. 50, 102 S. Ct. 2858 (1982)

findings of fact and conclusions of law to the district court with respect to "non-core" matters. Thus, a party has a right to *de novo* review in non-core proceedings. Slagter does not contest the constitutionality of the use of the bankruptcy court as an adjunct of the district court in this fashion. Slagter only contests the provision modeled after the *Federal Magistrates Act* authorizing bankruptcy judges to enter final judgment in non-core matters upon the consent of the parties.

This Court has previously held that such consent provisions are constitutional. This Court has also held that consent to entry of a final judgment by an adjunct court may be inferred from a party's conduct during litigation. The constitutionality of the consent provisions of 28 U.S.C. §157(c)(2), as well as whether such consent may be inferred from a party's conduct during litigation has been given sufficient guidance from this Court.

The Fifth Circuit properly applied the law to the facts of the case in ruling that the Bankruptcy Court had jurisdiction to enter the Final Judgment. This is not an appropriate case upon which certiori should be granted on these issues.

ARGUMENT

I.

28 U.S.C. §157(c)(2) Does Not Violate *Northern Pipeline* or the Constitution

Slagter suggests that 28 U.S.C. §157(c)(2), which permits parties to consent to entry of final judgment in non-core proceedings, "eviscerates the meaning of and violates the express finding of the United States Supreme Court in *Northern Pipeline v. Marathon*, 458 U.S. 50,102 S. Ct. 2858 (1982)." [5] Slagter's analysis of *Northern Pipeline* is flawed. A proper analysis of *Northern Pipeline* reveals that the first issue presented for review has a converse relationship to the constitutional infirmity found to exist in *Northern Pipeline*. It was the lack of a consent provision in the 1978 *Bankruptcy Reform Act* that substantially contributed to its violation of Article III, not the presence of one.

After holding in Section III of its opinion that Article III prohibits Congress from establishing a legislative court to exercise complete jurisdiction over state law based private rights, this Court turned to the question of whether it was constitutionally permissible for the bankruptcy court to act as an

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[5] Slagter Petition Page 17

"adjunct" to the district court. In its analysis of this issue, this Court noted that Congress does possess the authority to create legislative courts which are assigned certain fact finding functions as an adjunct to Article III courts.

First, this Court pointed out that it had previously approved the use of administrative agencies as adjuncts to Article III courts in matters involving the adjudication of Congressionally created rights, citing, *Crowell v. Benson.*[6] Second, this Court noted that it had sustained the use of adjunct fact finders "even in the adjudication of constitutional rights - so long as those adjuncts were subject to sufficient control by an Article III district court."[7]

Citing *United States v. Raddatz*,[8] this Court noted that it upheld the *Federal Magistrate Act*, which authorized district court judges to refer Article III functions to a United States magistrate. "[T]he magistrates proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for

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285 U.S. 22,52 S.Ct. 285 (1932).

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Northern Pipeline at 78-79.

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447 U.S. 667,100 S. Ct. 2406 (1980)

additional evidence."[9] This Court also noted that an overriding consideration in upholding the *Federal Magistrates Act* was that magistrate judges were appointed and were subject to removal by the district court and that:

> "there was no serious threat that the exercise of the judicial power would be subject to incursion by the other branches." "[T]he only conceivable danger of a "threat" to the "independence" of the magistrate comes from within, rather than from without, the judicial department."[10]

In contrast to the *Federal Magistrates Act*, the 1978 *Bankruptcy Reform Act* changed the relationship between bankruptcy referees and the district courts by making the new bankruptcy courts independent of the district courts. Thus, under the 1978 *Bankruptcy Reform Act*, parties no longer had access to a judicial officer independent from the legislative branch of government. Additionally, the jurisdiction of the bankruptcy court was substantially expanded beyond those matters which were incidental to administration

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[9] *Id.* at 79.

[10] *Id. at Footnote 30, citing Raddatz.*

of bankruptcy cases.[11] Not only did the 1978 *Bankruptcy Reform Act* vest complete judicial authority in the bankruptcy courts with respect to federally created public rights, it also vested such authority with respect to constitutional and private state law created rights. The 1978 *Bankruptcy Reform Act* impermissibly violated Article III because it granted the bankruptcy courts "powers far greater than those lodged in the adjunct approved in either *Crowell* or *Raddatz*."[12] Thus, this Court held that §241(a) of the 1978 *Bankruptcy Reform Act* vested too much judicial power in a non Article III adjunct court and was unconstitutional.[13]

In response, Congress enacted the *Bankruptcy Amendments and Federal Judgeship Act* of 1984 (BAFJA)[14] Congress specifically provided in BAFJA that the bankruptcy judges in each judicial district

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Id.

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Id. at 86.

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Id. at 87.

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H.R.5174, 98 Cong. 2d Session (1984), *reprinted in* 1984 U.S. Code Cong. and Ad. News (98 Stat. 333) *et seq.*

constituted a unit of the bankruptcy court.[15] Bankruptcy judges were appointed by the chief judge in the circuit in which each bankruptcy judge was to serve and not by Congress, thus removing any encroachment upon the judiciary by persons "outside the judiciary." BAFJA gave bankruptcy judges the authority to enter final judgment in core proceedings[16], which was consistent with this Court's finding in *Northern Pipeline* that congressionally created public rights may be determined by a non-Article III court. With respect to non-core proceedings, those proceedings which involve state law personal rights that could exist only outside the bankruptcy context, Congress followed the *Federal Magistrates Act*[17]. Bankruptcy judges may hear a non-core proceeding. However, the bankruptcy judge is required to submit proposed findings of fact and conclusions of law to the district court, which reviews *de novo* a bankruptcy judge's proposed findings and conclusions to which a party has timely and specifically objected.

BAFJA cured the impermissible grant of

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§104(a) of BAFJA (28 U.S.C. §151)

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28 U.S.C. §157(b)

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28 U.S.C. §§631-629 (1982)

jurisdiction to the bankruptcy court by limiting the ability of bankruptcy judges to enter final judgment and by giving parties a right to *de novo* review in non-core proceedings as to matters to which they specifically objected. These statutory provisions do not violate the express holding of *Northern Pipeline* and Slagter does not suggest that they do. Slagter does not contest the constitutionality of §157(c)(1). Rather, Slagter only contends that the consent provisions of §157(c)(2) are unconstitutional.[18]

This Court has held that such consent provisions are constitutional. Four years after *Northern Pipeline*, this Court held that the right to be heard by an Article III court is waivable. *In Commodity Futures Trading Commission v. Schor*,[19] this Court held that Article III does not confer an absolute right to have every type of claim heard by an Article III Court. Rather, the Court ruled that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver just as are other personal constitutional rights that dictate the

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[18] Ironically, §157(c)(2) does not give bankruptcy judges any greater judicial authority unless the parties consent. Thus, §157(c)(2) is more a grant of power to the parties than to the bankruptcy judge.

[19] 478 U.S. 833, 106 S. Ct. 3245 (1986)

procedures by which civil and criminal matters must be tried."[20]

In so holding, this Court condoned the use of consent in the bankruptcy context by stating:

> Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the **absence** of consent to an initial adjudication before a non-Article III tribunal was relied on as a **significant factor** in determining that Article III forbade such an adjudication.[21]

Slagter argues that *Commodity Futures* stands for the proposition that this Court is obligated to grant certiori to determine whether the consent provision contained in §157(c)(2) violates Article III. To the contrary, *Commodity Futures* clarifies the holding in *Northern Pipeline* that it is the absence of a provision permitting consent to final determination by a non-Article III court rather than the presence of one which violates the requirements of the Constitution. It

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Id. at 848-849

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Id, at 849 *emphasis added.*

would be an apparent waste of this Court's judicial resources to examine the constitutionality of giving a party an opportunity to consent to bankruptcy court jurisdiction in non-core matters when it was the lack of such a provision that provided the impetus for this Court's decision in *Northern Pipeline*.[22]

Respondent has been unable to locate a single circuit court opinion addressing the constitutionality of the consent provisions of §157(c)(2). Slagter only first raised the constitutionality of §157(c)(2) in two pages of his Reply Brief filed in the Fifth Circuit Court of Appeals without any substantive analysis. The Fifth Circuit did not even mention the issue in its less than two page opinion affirming the District's dismissal of Slagter's appeal as equitably moot. This is not an issue which, under the circumstances, this Court should grant a petition for writ of certiori.

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[22] Finally, it should be noted that the portions of this Court's opinion in *Commodity Futures* relied upon by Slagter pertains to the extent to which Congress can vest judicial power in non-Article III courts. Slagter does not contest placement of the judicial authority in the bankruptcy court under §157(c)(1), he only attacks the consent provision, which was dealt with in *Commodity Futures* in a completely different section of the opinion than the portions quoted by Slagter in his Petition.

II.

This Court Has Recently Held That Consent May Be Implied In Order to Comply With The Constitution.

Slagter's second question upon which he requests this Court to grant his Petition is based upon the argument that while §157(c)(2) does not provide for express consent, *Bankruptcy Rule* 7012(b) requires the consent to be express. Again, we turn to this Court's review of the *Federal Magistrates Act* in response to the question presented.

In *Roell v. Withrow,*[23] this Court held that consent to proceedings before a magistrate judge can be inferred from a party's conduct during litigation and does not need to be express. Like Rule 7012(b)(1) of the *Federal Rules of Bankruptcy Procedure*, Rule 73(b) of the *Federal Rules of Civil Procedure* requires specific written consent to entry of final judgment by a magistrate judge.[24] Likewise, the

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[23] 538 U.S. 580, 123 S.Ct. 1696 (2003)

[24] Rule 73(b)(1) states:

When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. §636(c). To signify their consent, the parties must jointly or separately

Federal Magistrate's Act requires express, written consent.[25] In *Roell*, the Fifth Circuit held consent must be express and can not be inferred from a party's conduct. In reversing the Fifth Circuit, this Court stated:

> "The virtue of strict insistence on the express consent requirement embodied in §636(c)(2) is simply the value of any bright line: here, absolutely minimal risk of compromising the right to an Article III judge. But there is another risk, and insisting on a bright line would raise it: the risk of a full and complicated trial wasted at the option of an undeserving and possibly opportunistic litigant.[26]

Citing *Commodity Futures* and *Raddatz*, this Court held that where a party is aware of the right to *de novo* review by an Article III court and waives that right through conduct, implied consent is sufficient

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file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

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28 U.S.C. 636(c)(2)

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Roell v. Withrow at 590

even though Rule 73(b) and §636(c)(2) require express written consent.[27]

In the instant case, Slagter was well aware of his right to *de novo* review of the Bankruptcy Court's findings of fact. In his Motion to Dismiss and Abstain Slagter expressly stated that **"Any decision of this court would be subject to review, before becoming final, by the district court."**

With knowledge of his right to *de novo* review, Slagter fully submitted himself to the jurisdiction of the Bankruptcy Court. After the motion for abstention was denied, Slagter proceeded to file a state law based, non-core counterclaim and a motion for summary judgment, both of which requested the Bankruptcy Court to enter judgment in his favor. Even after the Court entered its opinion on March 10, 2005 and Stonecraft filed its Motion for Entry of Final Judgment, Slagter made no objection to entry of final judgment by the Bankruptcy Court. He perfected his appeal pursuant to 28 U.S.C. §158(a) and treated the judgment as a final judgment on

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Slagter's assertion that the First Circuit Court of Appeals held in *Sheridan v. Michels*, 362 F.3d 96(1st Cir.2004) that express consent is required is incorrect. In *Sheridan*, the First Circuit stated that "In *In Re U.S. F. Corp.* 938 F.2d 1467(1st Cir. 1991) we decided that in certain circumstances, at least where the parties actions appear to speak as clearly as words, consent may be implied." *Id. at 101.*

appeal. It was not until early January, 2006, nine months after Stonecraft filed its Motion for Entry of Final Judgment, that Slagter first raised §157(c)(2).

Slagter argues that it was not necessary for him to raise the issue any earlier because the judgment was not enforceable until the Bankruptcy Court amended the Final Judgment in January, 2006. This argument is a red herring. The time at which the judgment becomes enforceable and the standard of review of the bankruptcy court's findings of fact are two separate and distinct matters. Further, Slagter must have believed that it was the intention of the Bankruptcy Court for the judgment to be final and enforceable when he filed a motion for a stay in the Bankruptcy Court and two additional motions for a stay in the District Court.

Finally, Slagter's argument that he believed the final judgment preserved his right to *de novo* review of the Bankruptcy Court's findings lacks credibility. In his brief in the District Court Appeal, Slagter asserted that a clearly erroneous standard of review applied to the Bankruptcy Court's findings. That brief was filed some three months prior to Slagter's first mention of §157(c)(2) in January, 2006. Thus, Slagter's request for *de novo* review **was an afterthought** since he first requested it after he filed his District Court brief asserting a clearly erroneous standard of review.

As the Fifth Circuit correctly held, Slagter impliedly consented to entry of final judgment by the Bankruptcy Court.

III.
There was no Error in the District Court's Dismissal of the Appeal.

Slagter asserts that the District Court erred when it dismissed his District Court appeal as equitably moot without first determining whether the Bankruptcy Court could enter a final judgment and whether the Bankruptcy Court should have mandatorily abstained.

Throughout his Petition for Writ of Certiori as well as in his arguments before the Fifth Circuit, Slagter points out that Stonecraft agreed in its response to his motion to abstain that Count II of the Amended Complaint was a non-core proceeding. Slagter ignores that after the Motion for Abstention was denied, he fully submitted himself to the jurisdiction of the Bankruptcy Court. Now he requests this Court to grant certiori on the issue of whether the jurisdictional issue should have been included in the District Court opinion dismissing his case as moot. However, that issue was considered by the Fifth Circuit, which found that the Bankruptcy Court did have jurisdiction to enter the final judgment. Slagter was not precluded from raising the issue in the Fifth Circuit and was not prejudiced by

any failure of the District Court to include a discussion of jurisdiction in its opinion.

It should be noted that it was **Slagter himself who first asserted that his appeal would be dismissed as moot** if he were not granted a stay pending appeal. In his Motion for a Stay Pending Appeal filed in the Bankruptcy Court as well as in his motions for a stay filed in the District Court, Slagter stated that he would be irreparably harmed if he were not granted a stay because **"It would render an appeal totally moot."** USCA5 295 Now, despite having convinced the Bankruptcy Court to grant him a conditional stay based upon that fact, Slagter argues that it would be "inequitable" to dismiss his appeal as moot.

However, the inequity lies in a party taking a position to induce a court to rule in his favor, only to abandon that position when it later proves to have been improvident. This specific type of inequity even has its own doctrine - the judicial estoppel doctrine, which is designed to protect the judicial system, not the litigants.[28] There are three requirements in the Fifth Circuit for application of the judicial estoppel doctrine; (1) the party is judicially estopped if his position is clearly inconsistent with a previous

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In Re: Superior Crew Boats, Inc., 374 F. 3d 330 (5th Cir. 2004).

position; (2) the court must have accepted the previous position; (3) the inconsistency must not have been inadvertent. *Id.* at 335. In the instant case, all three elements of judicial estoppel are present. Slagter is judicially estopped from now asserting that the District Court erred when it dismissed his appeal as equitably moot.

CONCLUSION

Slagter had no objection to the Bankruptcy Court entering its Final Judgment and only later requested the Bankruptcy Court to submit proposed findings of fact and conclusions of law to the District Court as an afterthought, nine months after the Final Judgment was entered. During that time, Slagter resisted enforcement of the Bankruptcy Court's Judgment by filing his own Chapter 13 Bankruptcy Petition in Michigan and numerous motions in the District and Bankruptcy Courts. When Stonecraft was finally able to enforce its Judgment, it consummated its Plan of Liquidation and Slagter's appeal was dismissed as moot, just as Slagter confessed it would be when he sought a stay of the Final Judgment.

No reversible error was committed by the lower courts. Stonecraft requests this Court to put an end to what has now become an eight year dispute by denying Slagter's Petition for Writ of Certiori.

Respectfully submitted,

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